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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-1796

DAVID R. FREEMAN,
Director, State of Missouri Department of Social Services,
and,
PHYLLIS J. RESER,
Director, State of Missouri Department of Social Services,
Division of Family Services,
Petitioners,

v.

REPRODUCTIVE HEALTH SERVICES,
and,
ROBERT R. DUEMLER, M.D.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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REPRODUCTIVE HEALTH SERVICES,
and,
ROBERT R. DUEMLER, M.D.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioners, David R. Freeman and Phyllis J. Reser, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on January 9, 1980 and that Court's order in response to the petition for rehearing entered on February 11, 1980.

OPINIONS BELOW

The opinion of the Court of Appeals, officially reported at 614 F.2d 585 (8th Cir. 1980), appears in Appendix 1 hereto. The Eighth Circuit's order in response to the petition for rehearing, not reported, appears as Appendix 2 hereto. The opinions of the United States District Court for the Western District of Missouri, both an "Opinion and Order" entered on January 26, 1979 and a "Memorandum and Order" entered on March 7, 1979, not yet reported, appear as Appendices 3 and 4.

JURISDICTION

The opinion of the Court of Appeals for the Eighth Circuit was entered on January 9, 1980. The Eighth Circuit ruled upon a timely petition for rehearing on February 11, 1980, and this petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether Title XIX forbids a participating state from instituting a Medicaid policy of subsidizing only life-saving abortions.

2. Whether the United States Constitution permits a state, participating in the Medicaid program, to include within its Medicaid coverage only those abortions qualifying for federal financial participation pursuant to the Hyde Amendment. The resolution of this question will require, for all practical purposes, a judgment as to the constitutionality of the Hyde Amendment itself.

3. Whether 42 U.S.C. §1988 authorizes a district court to award attorneys' fees in a case where a state regulation is found to be inconsistent with Title XIX of the Social Security Act and is thereby invalidated under the Supremacy Clause.

4. Whether attorneys' fees, awarded by a district court pursuant to 42 U.S.C. §1988, should be restricted to an amount fairly reflecting the extent to which the party receiving the fees has prevailed.

5. Whether 42 U.S.C. §1988 confers upon the federal courts of appeals the authority to award attorneys' fees to prevailing parties.

CONSTITUTIONAL PROVISIONS, STATUTES, AND FEDERAL REGULATIONS INVOLVED

Section 1 of the Fourteenth Amendment to the Constitution of the United States:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the priviliges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C. §1396:

> "For the purpose of enabling each State, as far as practicable under the conditions in such State, to furnish (1) medical assistance on behalf of families with dependent children and of aged, blind, or disabled individuals, whose income and resources are insufficient

to meet the costs of necessary medical services, and (2) rehabilitation and other services to help such families and individuals attain or retain capability for independence or self-care, there is hereby authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this subchapter. The sums made available under this section shall be used for making payments to States which have submitted, and had approved by the Secretary of Health, Education, and Welfare, State plans for medical assistance."

42 U.S.C. §1396a(a)(17), in pertinent part:

"A State plan for medical assistance must—

(17) include reasonable standards . . . for determining eligibility for and the extent of medical assistance under the plan which . . . are consistent with the objectives of this subchapter, . . ."

42 U.S.C. §1396a(a)(10)(B), in pertinent part:

"A State plan for medical assistance must—

(10) provide—

(B) that the medical assistance made available to any individual described in clause (A)—

(i) shall not be less in amount, duration, or scope than the medical assistance made available to any other such individual, and

(ii) shall not be less in amount, duration, or scope than the medical assistance made available to individuals not described in clause (A); . . ."

42 U.S.C. §1396(a)(f), in pertinent part:

"Notwithstanding any other provision of this subchapter, . . . no State . . . shall be required to provide medical assistance to any aged, blind, or disabled

individual . . . for any month unless such State would be (or would have been) required to provide medical assistance to such individual for such month had its plan for medical assistance approved under this subchapter and in effect on January 1, 1972, been in effect in such month, . . .''

Hyde Amendment Act of Oct. 20, 1978, Pub.L. No. 95-480, §210, 92 Stat. 1586:

''None of the funds contained in this Act shall be used to perform abortions except when the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest, when such rape or incest has been reported promptly to a law enforcement agency or public health service, or except in those instances were severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term when so determined to by two physicians.''

42 U.S.C. §1988:

''The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is

held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

42 C.F.R. §440.230, in pertinent part:

"(b) Each service must be sufficient in amount, duration and scope to reasonly achieve its purpose.

(c)(1) The medicaid agency may not [arbitrarily] deny or reduce the amount, duration or scope of required service under §§ 440.210 [for the categorically needy] and 440.220 [for the medically needy] to an otherwise eligible recipient solely because the diagnosis, type of illness or condition.

(2) The agency may place appropriate limits on a service based on [such criteria] as [medical necessity or utilization control procedures]."

STATEMENT OF THE CASE

The respondents initiated this lawsuit by filing a complaint for declaratory judgment and injunctive relief in the United States District Court for the Western District of Missouri. The complaint premised federal court

jurisdiction on 28 U.S.C. §§1331 and 1343, the Federal Declaratory Judgment Act, 28 U.S.C. §§2201 and 2202, and 42 U.S.C. §1983. The relief afforded by the District Court seems most clearly to be founded on the Federal Declaratory Judgment Act. Challenged on entirely constitutional grounds was a regulation promulgated by the Missouri Department of Social Services, which regulation defined the term "medically indicated" as that term is used in Section 208.152(12), RSMo 1978.

By regulation 13 C.S.R. §40-81.100, Missouri has provided:

> "(1) The Division of Family Services shall expend federal and state funds for physician and hospital services for abortions only where an abortion is medically indicated.
>
> (2) "Medically indicated" shall mean where the attending physician in the exercise of his best clinical, medical judgment believes a fullterm pregnancy and childbirth would cause cessation of the mother's life.
>
> (3) The attending physician shall certify to the director, the Division of Family Services, his medical diagnosis that a fullterm pregnancy and childbirth would cause cessation of the mother's life.
>
> (4) The attending physician shall submit to the director of the Division of Family Services the patient's written consent to the abortion; such consent shall contain an affirmative statement that her consent is informed and freely given and is not the result of coercion."

The complaint filed in the district court did not allege that the challenged regulation was in violation of Title XIX of the Social Security Act or that any other statutory bases existed for invalidation of said regulation.

The District Court entered a temporary restraining order which, after amendment, enjoined the enforcement of the challenged Missouri regulation except in accordance with the abortion funding position taken by the Department of Health, Education and Welfare pursuant to the Hyde Amendment.

The Secretary of the Department of Health, Education and Welfare, pursuant to the explicit directions of the District Court, filed an *amicus curiae* brief stating his position that the challenged regulation was constitutionally permissible. The Secretary stated:

> "The State of Missouri has substantial interests in protecting the potential life of a fetus and in its rate of population growth. There can be no question that these interests are rationally related to the Missouri regulation challenged by the plaintiffs. The state's interests are no less substantial because the Missouri regulation prohibits the use of Medicaid funds for abortions unless 'a full-term pregnancy and childbirth would cause cessation of the mother's life.' The Supreme Court has stated very plainly that a legislative determination which favors childbirth over abortion is both a rational and constitutional policy.
>
> In light of the holdings in *Maher* and *Poelker*, it is clear that plaintiffs' claims in the present case have been decided by the Supreme Court. [Footnote omitted.]
>
> * * *
>
> Thus, the Supreme Court has recognized that a legislative determination can be rationally made that no public funds will be used for abortions except where a full-term pregnancy will cause the cessation of the mother's life."

Pursuant to mutual stipulation, this case was submitted for decision to the District Court on reciprocal motions for summary judgment.

The District Court filed its "Opinion and Order" on January 26, 1979. That Court, the Honorable Elmo B. Hunter presiding, held that the State of Missouri had, in limiting public funding of abortions to those instances where "a full-term pregnancy and childbirth would cause cessation of the mother's life", acted in violation of the dictates of the Medicaid Act and the regulations promulgated thereunder. The Court enjoined the defendants from enforcing the challenged regulation except insofar as it was rendered consistent with the current Hyde Amendment by the Court's order. In that regard, the District Court concluded that applicable statutory and regulatory law required only that Missouri fund abortions for the needy to the extent that it was eligible to receive reimbursement therefor pursuant to the substantive sharing formula set forth in the Medicaid statute. Finally, the District Court ruled that the challenged regulation, as modified to become consistent with the Hyde Amendment, was not violative of the Equal Protection Clause or any other of the constitutional bases advanced by the plaintiffs.

By a "Memorandum and Order" filed March 7, 1979, the District Court sustained the respondents' motion to amend judgment by awarding four thousand four hundred and forty-two dollars and fifty cents ($4,442.50) in attorneys' fees.

On appeal, in an opinion filed January 9, 1980, the United States Court of Appeals for the Eighth Circuit affirmed that portion of the District Court's order finding the challenged regulation to be inconsistent with Title XIX, affirmed that portion of the District Court's opinion finding that the Hyde Amendment constituted a substantive

statutory alteration of Missouri's abortion subsidy obligations under Title XIX, but reversed the District Court on the issue of the regulation's constitutionality as amended by the District Court to become consistent with the Hyde Amendment. The effect of the District Court's opinion had been to require Missouri to participate in the funding of those abortions eligible for federal fundings under the provisions of the Hyde Amendment. In essence, the Court of Appeals found that a state, funding exactly those abortions prescribed by the Hyde Amendment, was in violation of the Equal Protection Clause of the Fourteenth Amendment. The judgment of the Court of Appeals was tantamount to a finding that the Hyde Amendment itself is unconstitutional.

On February 11, 1980, upon respondents' petition for a rehearing, the Eighth Circuit awarded four thousand three hundred and ninety-three and one cent ($4,393.01) in attorneys' fees and costs.

The mandate of the Eighth Circuit was issued to the District Court on February 21, 1980.

REASONS FOR GRANTING THE WRIT

I

That portion of the decision below finding the Missouri regulation incompatiable with Title XIX is in conflict with the applicable decision of this court, and so misintreprets the requirements of Title XIX with respect to the funding of abortions as to call for an exercise of this court's power of supervision.

Both the District Court and the Court of Appeals judged a Missouri regulation limiting Medicaid funding to those abortions wherein a fullterm pregnancy and childbirth would cause cessation of the mother's life as incompatiable with the Federal Medicaid Act (Title XIX). Very recently, this Court heard oral argument in the case of *Williams, et al.* v. *Zbaraz, et al.*, Nos. 79-4, 79-5, and 79-491. That case was extensively briefed before this Court and involved a question of whether an Illinois limitation on abortion funding, similar to the restriction inherent to the challenged Missouri regulation in this case, was in violation of Title XIX of the Social Security Act. The extensive proceedings already conducted before this Court clearly indicate that the matter of a state's restriction on abortion funding and the compatiability of such a restriction with the Social Security Act is a significant and recurring issue. That many states have chosen to restrictively define categories of abortions eligible for Medicaid funding, and that the issue presents a recurring problem to the judiciary, is demonstrated by the numerous cases on the subject. See, *e.g.*, *Zbaraz* v. *Quern*, 596 F.2d 196 (7th Cir. 1979), *petition for cert. filed*, 48 U.S.L.W. 3013 (U.S. July 24, 1979)(No. 79-64); *Preterm Inc.* v. *Dukakis*, 591 F.2d 121 (1st Cir. 1979), *cert. denied*, 99 S.Ct. 2182, 2183 (1979); *Doe* v. *Busbee*, 471 F.Supp. 1326 (N.D.Ga. 1979);

Planned Parenthood Affiliates of Ohio v. *Rhodes*, 477 F.Supp. 529 (S.D.Ohio 1979); *Roe* v. *Casey*, 464 F.Supp. 483 (E.D.Pa. 1978); *Emma G.* v. *Edwards*, No. 77-1342 (E.D.La. Nov. 27, 1978); *Smith* v. *Ginsburg*, No. 75-0380CH (S.D.W.Va., May 9, 1978); *Right to Choose* v. *Byrne*, 398 A.2d 587 (N.J.Super.Ct.Ch.Div. 1979); *D__ R__* v. *Mitchell*, 456 F.Supp. 609 (D.Utah 1978).

It would appear from the judicial activity on the subject that the question of what abortions Title XIX requires states to fund is one which should be settled by this Court. In actuality, however, this Court has already resolved the issue in *Beal* v. *Doe*, 432 U.S. 438, 97 S.Ct. 2366, 53 L.Ed.2d 464 (1977), and the decision of the court below was in conflict with that applicable Supreme Court opinion. At issue in *Beal* v. *Doe*, *supra*, was the validity of a Pennsylvania statute defining the term "medically necessary" as when "[t]here is documented medical evidence that continuance of the pregnancy may threaten the health of the mother." 432 U.S. at 441 n.3. That Pennsylvania statute and the Missouri regulation at issue in this case are indistinguishable for all practical purposes. This Court held that Title XIX does not require participating states to fund every medical procedure, but that each state is given broad discretion to determine how much medical assistance is reasonable and consistent with Title XIX; that it is not inconsistent with Title XIX to refuse to fund unnecessary, although perhaps desirable, medical services; that the Court would not presume that Congress intended to condition state participation in Medicaid upon the state's willingness to compromise its strong interest in encouraging normal childbirth; and, given the fact that abortions were unlawful in most states at the time Congress passed Title XIX, it is not consistent to suppose that Congress intended to require, as opposed to permit, participating states to fund nontherapeutic abortions. In fact, at the time Congress

passed Title XIX, in Missouri as well as in most other states, the only "therapeutic" abortions were those necessary to save the life of the mother or unborn child. In *Beal,* this Court also took into account the position of the Department of Health, Education and Welfare, which agency administers Title XIX, that the Act allows but does not mandate funding of nontherapeutic abortions. The Eighth Circuit refused to abide by the position of HEW in the present case.

This conflict between the decision below and the announced position of this Court in *Beal* v. *Doe, supra,* justifies a grant of certiorari to review the judgment of the Eighth Circuit.

The petitioners also believe that the court below simply misconstrued and misinterpreted the requirements of Title XIX. Should certiorari issue, the petitioners intend to address the actual statutory requirements inherent to the Social Security Act in their brief.

II.

That portion of the decision below, finding unconstitutional a state policy of funding those abortions eligible for federal financial participation under the provisions of the Hyde Amendment, is in conflict with the principles announced by the applicable decisions of this court, and is tantamount to a finding that the Hyde Amendment itself is unconstitutional, an important question of federal law which has not been, but should be, settled by this court.

Although this Court has not considered the precise issue of the constitutionality of the Hyde Amendment, the decision below is in conflict with the action taken by this Court in the cases of *Maher v. Roe,* 432 U.S. 464, 97 S.Ct. 2376, 53 L.Ed.2d 484 (1977); *Poelker* v. *Doe,* 432 U.S. 519,

97 S.Ct. 2391, 53 L.Ed.2d 528 (1977); and *Califano* v. *McRae,* 433 U.S. 916, 97 S.Ct. 2993, 53 L.Ed.2d 1103 (1977). In this case, the Eighth Circuit found a fundamental constitutional right to exist requiring strict judicial scrutiny and a compelling state interest. At issue below and in *Maher* v. *Roe, supra,* were state restrictions on the types of abortions that would be funded. But, in *Maher,* this Court found that there was no fundamental constitutional right to a state financed abortion, and that a state need not show a compelling interest in order to justify a regulation limiting those abortions for which public monies would be made available.

> "We think it abundantly clear that a State is not required to show a compelling interest for its policy choice to favor normal childbirth any more than a State must so justify its election to fund public but not private education." 432 U.S. at 477.

In that case, the Court applied a lenient "rational basis" standard in judging a state's welfare abortion funding policy. The court below, in direct conflict with the approach taken by this Court in *Maher,* required Missouri to show and prove a compelling interest. The application of a strict judicial scrutiny approach to the equal protection ramifications of the Missouri regulation at issue puts the Eighth Circuit in direct conflict with the equal protection analysis announced by this Court for issues respecting the funding of abortions.

The court below also ignored the decision of this Court in *Poelker* v. *Doe,* 432 U.S. 519, 97 S.Ct. 2391, 53 L.Ed.2d 528 (1977). At issue in that case was the constitutionality of a policy directive of the Mayor of the City of St. Louis prohibiting the performance of abortions in that city's hospitals "except when there was a threat of grave physiological injury or death to the mother." 432

U.S. at 520. In *Poelker,* this Court was required to reverse the Eighth Circuit. Relying on the principles set down in *Maher* v. *Roe, supra,* this Court found no constitutional violation by the City of St. Louis in electing, as a policy choice, to provide publically financed hospital services for childbirth and not providing corresponding services for nontherapeutic abortions.

There has been a previous attempt to have this Court declare the Hyde Amendment unconstitutional. In *Califano* v. *McRae,* 433 U.S. 916, 97 S.Ct. 2993, 53 L.Ed.2d 1103 (1977), this Court ordered a judgment granting a preliminary injunction against the original Hyde Amendment vacated, and required that further hearings be held in light of the rulings in *Beal, Maher* and *Poelker.* The first Hyde Amendment, which was before the Supreme Court in *Califano* v. *McRae,* limited the expenditure of public funds to life-endangering pregnancies. The version of the Hyde Amendment which the District Court imposed upon the State of Missouri, by its decision modifying the challenged regulation, also takes into account those instances "where severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term. . . ." The Hyde Amendment at issue in *Califano* v. *McRae* was more restrictive than the Hyde Amendment position followed by Missouri and found unconstitutional by the lower court, and more restrictive than the abortion funding regulations of Pennsylvania and Connecticut in *Beal* and *Maher.*

These conflicts between the position taken by the court below and the principles announced by this Court in applicable cases justify the grant of certiorari to review the opinion of the Eighth Circuit.

This Court has not, in specific terms, announced a position on the constitutionality of the Hyde Amendment.

Very recently, it has heard oral argument on the issue in the case of *Harris* v. *McRae,* No. 79-1268. The issue is of significant and wide-spread importance. The Hyde Amendment effected federal dollars available to all states for the purpose of abortion funding. And, in its decision below, the district court found that the Hyde Amendment subsequently altered the statutory requirements of Title XIX so as to allow Missouri, as a statutory matter, to fund only those abortions covered by the Amendment. See also, *Preterm, Inc.* v. *Dukakis,* 591 F.2d 121 (1st Cir. 1979). The court of appeals found that Missouri could not constitutionally maintain and enforce a Hyde Amendment statutory scheme for funding abortions. As the Eighth Circuit stated,

> "Our own constitutional holding, of course, does not touch the Hyde Amendment because the plaintiffs have not attacked it and because the United States is not a party, see 28 U.S.C. § 2403(a). We do acknowledge, however, that our judgment of the constitutionality of a Missouri statutory scheme paralleling the Hyde Amendment suggests what our judgment of the Hyde Amendment would be, were it properly before us." Appendix 1, page A-12 n.13.

If this Court should determine that applicable decisions previously announced do not precisely resolve the constitutional issue existing in this case, then the petitioners submit that the constitutionality of the Missouri policy, modified by the District Court so as to be completely consistent with the provisions of the Hyde Amendment, is an important question of federal law which should be settled by this Court.

III.

The decision below, that attorneys' fees could be awarded by a district court in a case decided under the supremacy clause, presents an important question of federal law which has not been, but should be, settled by this court.

In the District Court, the respondents challenged the Missouri abortion funding regulation on multiple constitutional bases. The respondents alleged that the jurisdiction of the District Court was grounded, in part, on 42 U.S.C. §1983.

The Court of Appeals held that:

> "The district court awarded plaintiffs attorneys' fees because they prevailed on their claim that the Missouri regulation is contrary to Title XIX, although the scope of relief was restricted under the court's interpretation of the Hyde Amendment. Citing *Lund v. Affleck*, 442 F. Supp. 1109, 1113 (D.R.I. 1977), the district court decided that plaintiffs' lack of success below on their substantial constitutional claim was no bar to an award of attorneys' fees. We agree. *See generally Kimbrough v. Arkansas Activities Association*, 574 F.2d 423 (8th Cir. 1978)." Appendix 1, page A-27.

The Civil Rights Attorneys' Fees Award Act of 1976 confers discretion on the district courts to allow reasonable attorneys fees in actions to enforce the provisions of specific federal statutory law, including §1983.

In *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 420, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975), this Court reaffirmed the American Rule, *i.e.*, that prevailing litigants are not ordinarily entitled to collect reasonable attorneys' fees from the losers. The Court went on to declare that only in such cases were Congress has specifically

carved out statutory exceptions to the general rule with respect to attorneys' fees awards do the federal courts have authority to award attorneys' fees. *Id.* at 269. Congress passed the Fees Award Act in reaction to the Supreme Court decision in *Alyeska Pipeline*. Congress did not include the Supremacy Clause, the Federal Declaratory Judgment Act, or Title XIX.

Contrary to the language of the court below, the respondents did not claim in their pleadings that the Missouri regulation was contrary to Title XIX. Their legal theories were solely constitutional. Nevertheless, the District Court granted them limited relief under the Supremacy Clause, finding as a matter of law that the Missouri regulation was contrary to Title XIX, a decision consistent with a district court's declaratory judgment powers.

This Court has not decided that awards of attorneys' fees are proper in declaratory judgment cases, finding conflicts between federal statutory laws and state regulations, under the Supremacy Clause. Likewise, 42 U.S.C. §1988 does not justify such awards. The respondents may have cited §1983 in their pleadings, but relief was granted only a Supremacy Clause basis. Because, as more fully discussed in reason No. II of this writ, the petitioners believe that no constitutional cause of action existed, the mere recitation of §1983 as a jurisdictional basis should not justify an award of attorneys' fees. A decision by this Court on this issue would address a significant and widespread problem. States are increasingly being subjected to requests for attorneys' fees. Due to *Alyeska Pipeline*, 42 U.S.C. §1988 must be interpreted narrowly. The states are entitled to an pronouncement by this Court respecting the nature of cases which will qualify for attorneys' fees awards.

IV.

The decision below conflicts with the decisions of other courts of appeals with respect to the proper interpretation of 42 U.S.C. §1988 as it applies to the meaning of the term "prevailing party."

Section 1988 of Title 42 grants the district courts discretion to award attorneys' fees to prevailing parties.

In the District Court, the respondents sought a judgment that Missouri should be required to fund all abortions found by attending physicians to be medically necessary. The relief actually granted by the District Court was limited to a requirement that Missouri fund Medicaid abortions in a manner consistent with the provisions of the Hyde Amendment. This was, indeed, limited relief, in that the Hyde Amendment, as a practical matter, will result in very few abortions being funded which would not have been funded under the Missouri regulation as drafted. Nevertheless, the District Court awarded attorneys' fees on the basis of all hours claimed by counsel for the respondents.

Citing its own decision in *Brown* v. *Bathke,* 588 F.2d 634, 638 (8th Cir. 1978), the Eighth Circuit affirmed the District Court's exercise of discretion in awarding attorneys' fees based on all the work of the attorneys for respondents. Appendix 1, page A-27.

The decision below and *Brown* v. *Bathke, supra,* are in conflict with the decision of the First Circuit in *Nadeau* v. *Helgemoe,* 581 F.2d 275, 279 (1st Cir. 1978), that the amount of attorneys' fees received by a prevailing party should be based on the work performed on the issues on which the prevailing party was successful.

The decisions of the Eighth Circuit also conflict with the Third Circuit opinion in *Hughes* v. *Repko,* 578 F.2d 483 (3rd Cir. 1978), in which the court directed a district

court to give a prevailing party credit only for hours which were relatively supportive of successful claims.

The decision below is also in conflict with the position of the Tenth Circuit, *Pearson* v. *Western Electric Company, Western Electric Installation Organization District Office,* 542 F.2d 1150 (10th Cir. 1976), the Ninth Circuit, *Schaeffer* v. *San Diego Yellow Cabs, Inc.*, 462 F.2d 1002 (9th Cir. 1972), and the Sixth Circuit, *Marr* v. *Rife,* 545 F.2d 554 (6th Cir. 1976).

It is important that these conflicts between the circuit courts of appeals be resolved by this Court. The states are increasingly becoming involved in requests for attorneys' fees under §1988. Although the actual monetary amount in this case is not large, Missouri is presently involved in the litigation of cases in which massive attorney's fees have been or will eventually be sought. The experience of Missouri is that, typically, plaintiffs will institute cases containing multiple factual issues basing the relief sought on alternative legal theories. If they are at all successful, general experience has been that such plaintiffs prevail only on a limited number of the factual issues litigated and that the relief given, if any, is based on one of several alternative legal theories. It is very important that the matter in which the term "prevailing party" is to be interpreted should receive attention by this Court. It is totally unfair that states, as defendants, should be required to compensate counsel for all hours spent on a complex case when the success of that counsel is severely limited.

V.

The decision below awarding attorneys' fees on appeal presents an important question of federal law which should be settled by this court, i.e., **does 42 U.S.C. §1988 authorize the federal courts of appeals to award attorneys' fees.**

On February 11, 1980, in response to the respondents' petition for rehearing, the Court below awarded three thousand dollars in attorneys' fees on appeal.

Neither 42 U.S.C. §1988 nor any other federal statutory provision expressly authorizes the federal courts of appeals to award attorneys' fees. Without such express authorization, the authority to award such fees does not exist. *Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 U.S. 420, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975). Section 1988, by its specific terms, confers jurisdictional powers upon the district courts, including the discretion to award attorneys' fees to prevailing parties.

The Eighth Circuit has, as a routine matter, been awarding attorneys' fees on appeal claiming jurisdiction to do so under §1988. Unless this Court addresses, for the first time, whether §1988 permits the federal courts of appeal to award attorneys' fees, it must be assumed that the Eighth Circuit will continue to make such awards without authority or jurisdiction.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Eighth Circuit.

Respectfully submitted,

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May, 1980

APPENDIX 1

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 79-1275

REPRODUCTIVE HEALTH SERVICES, ROBERT H. DUEMLER, M.D., *Appellants*,

MICHAEL FREIMAN, M.D.

v.

DAVID R. FREEMAN, Director, State of Missouri Department of Social Services, and PHYLLIS J. RESER, Director, Department of Social Services, Division of Family Services, State of Missouri, *Appellees*.

Appeal from the United States District Court for the Western District of Missouri

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No. 79-1346

REPRODUCTIVE HEALTH SERVICES, ROBERT H. DUEMLER, M.D., *Appellees*,

MICHAEL FREIMAN, M.D.,

v.

DAVID R. FREEMAN, Director, State of Missouri Department of Social Services, and PHYLLIS J. RESER, Director, Department of Social Services, Division of Family Services, State of Missouri, *Appellants*.

Appeal from the United States District Court for the Western District of Missouri

Submitted: October 8, 1979

Filed: January 9, 1980

Before ROSS and STEPHENSON, Circuit Judges, and McMANUS, *District Court Judge.

STEPHENSON, Circuit Judge.

At issue is the validity of a Missouri medical assistance regulation that makes public subsidy of abortions available only where a full-term pregnancy and childbirth would cause the death of the mother. The district court[1] held the regulation invalid on the basis that it conflicted with the Federal Medicaid Act (Title XIX). The court further held, however, that Missouri could legally refuse to subsidize abortion expenses for which it would receive no federal reimbursement under the Hyde Amendment.[2] The court then determined that Missouri's abortion subsidy scheme, when made consistent with Title XIX as affected by the Hyde Amendment, was constitutionally permissible. The court awarded attorneys' fees to plaintiffs. We affirm the result of the court's statutory holdings and its award of attorneys' fees, but reverse its holding that Missouri can constitutionally withhold subsides for all non-Hyde Amendment abortions.

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[1]The Honorable Elmo B. Hunter, United States District Judge for the Western District of Missouri.

[2]The Hyde Amendment then in effect forbade the use of federal funds for abortions except to save the woman's life, prevent severe and long-lasting physical health damage, or provide medical procedures necessary for the victims of rape or incest.

*The Honorable Edward J. McManus, Chief Judge, United States District Court for the Northern District of Iowa, sitting by designation.

I. Background

Missouri received federal aid under the Federal Medicaid Act, Title XIX of the Social Security Act of 1965. Missouri uses this federal aid, supplemented by its own funds, to help its needy meet the expenses of several medical services. Through its Division of Family Services,[3] Missouri subsidizes hospital care, out-patient care, physicians' services, and family planning. Mo. Ann. Stat. § 208.152 (Vernon Supp. 1979). By regulation 13 C.S.R. § 40-81.100, however, Missouri has provided:

> (1) The Division of Family Services shall expend federal and state funds for physicians and hospital services for abortions only where an abortion is medically indicated.
>
> (2) "Medically indicated" shall mean where the attending physician in the exercise of his best clinical, medical judgment believes a fullterm pregnancy and childbirth would cause cessation of the mother's life.
>
> (3) The attending physician shall certify to the director, the Division of Family Services, his medical diagnosis that a fullterm pregnancy and childbirth would cause cessation of the mother's life.
>
> (4) The attending physician shall submit to the director of the Division of Family Services the patient's written consent to the abortion; such consent shall contain an affirmative statement that her consent is informed and freely given and is not the result of coercion.

Plaintiffs (physicians and a medical clinic financially injured by the regulation) sought declaratory and in-

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[3] *See* Mo. Ann. Stat. § 208.152 (Vernon Supp. 1979); affidavit of Thomas E. Singleton, Deputy Director of Medical Services, Division of Family Services, ("I am directly responsible for the administration of Title XIX * * * for the State of Missouri.").

junctive relief on the ground that 13 C.S.R. § 40-81.100 was unconstitutional under the fourteenth amendment.[4] Plaintiff Duemler is a physician who performs abortions for patients who qualify for Missouri Medicaid assistance. Duemler is a part-time employee of plaintiff Reproductive Health Services (Reproductive), an organization that operates an out-patient, first-trimester abortion facility. During 1976, Missouri Medicaid subsidized 2400 abortions, 1824 of which were performed at facilities provided by Reproductive, 166 of which were personally performed by Duemler. Most of these abortions were, in Duemler's medical judgment, medically necessary in light of all the factors that he considers relevant to the patient's well-being: the patient's physical, emotional, psychological, and familial circumstances, and the patient's age. Duemler believes that virtually none of the abortions he performs could be justified as necessary to save the patient's life.

With the promulgation of 13 C.S.R. § 40-80.100, the number of Medicaid recipients seeking abortions at Reproductive declined from 177 to 67 per month. In the last year, counsel inform us, the number of Medicaid abortions in Missouri has fallen to zero.

Both parties below moved for summary judgment, with physicians submitting supporting affidavits. Although the affidavits reflect philosophical differences as to the desirability of abortion,[5] we perceive no genuine medical dis-

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[4]Defendants do not dispute that plaintiffs have standing to assert the third party rights of women seeking subsidized abortions. The Supreme Court settled this point in *Singleton v. Wulff*, 428 U.S. 106, 108, 112-18 (1976).

[5]The affidavit of Dr. Ann E. Bannon, with which several physicians concur, states that "abortion is * * * bad medical practice. It is, in fact, an admission of the failure of medical practice. The deliberate killing of any patient born or unborn can never constitute good medical practice." While we respect the moral viewpoint that the assumptions in this statement reflect, we think it established beyond cavil that abortion is, in some instances, an appropriate medical procedure. *See, e.g., Colautti v. Franklin*, 439 U.S. 379, 398-400 (1979) (physicians employ a variety of abortion methods); *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52, 77 (1976)

(Continued on next page)

pute as to the following. There are situations in which a physician considers an abortion medically indicated or medically necessary even though a full-term pregnancy will not cause death.[6] Abortion may be medically necessary where the patient has genital cancers, proliferative retinopathy (retina disease), or nephropathy (kidney disease). In any of these cases, an abortion might be necessary to preserve the patient's health, yet only in an extremely rare situation could a physician accurately state that the life of the pregnant patient would be endangered if the pregnancy were to continue to term.[7]

II. Statutory Questions

A. *The Effect of Title XIX*

The district court, relying on *Preterm, Inc. v. Dukakis*, 591 F.2d 121 (1st Cir.), *cert. denied*, 99 S. Ct. 2182, 2183

Footnote continued

(use of saline amniocentesis as a method of abortion is an "accepted medical procedure" during and after first trimester of pregnancy); *see generally Roe v. Wade*, 410 U.S. 113, 164 (1973) (abortion decision and effectuation in first trimester of pregnancy to be "left to the medical judgment of the pregnant woman's attending physician").

[6]We understand that a procedure is "medically necessary" if, in a physician's professional judgment, that procedure is in his patient's best medical interest. *See generally Doe v. Bolton*, 410 U.S. 179, 192 (1973). We further understand that "medically necessary abortion" and "therapeutic abortion" mean the same thing. Although one dictionary defines "therapeutic abortion" as "abortion induced when pregnancy constitutes a threat to the mother's life," Webster's New International Dictionary 2372 (3d ed. 1971), the legal definition, as developed by the Supreme Court, is broader, and makes "therapeutic" synonymous with "medically indicated," "medically necessary," and "non-elective." *See, e.g., Poelker v. Doe*, 432 U.S. 519, 519-20 (1977); *Maher v. Roe*, 432 U.S. 464, 480 (1977). *Beal v. Doe*, 432 U.S. 438, 445 (1977).

[7]These assertions are made in the affidavit of Dr. Michael Freiman, with which several physicians concur. The opposing affidavit of Dr. Ann E. Bannon flatly rejects the assertion that abortion is medically necessary to treat drug addiction or to respond to a diagnosis of fetal deformity. The Bannon affidavit also disputes that abortion is medically appropriate where cardiovascular problems or diabetes are involved. The Bannon affidavit acknowledges, however, that pregnancy complicates these conditions, and thus inferentially concedes that pregnancy termination might, in some instances, be in the pregnant patient's best medical interest. The Bannon affidavit also states that it is "almost always" improper medical practice to use abortion in connection with other treatment for genital cancer. For related medical opinion, see *Zbaraz v. Quern*, 469 F. Supp. 1212, 1220 (N.D. Ill. 1979), *review granted, juris. postponed*, 48 U.S.L.W. 3356 (U.S. Nov. 26, 1979) (Nos. 79-4,5, 491).

(1979), held that Missouri's policy of subsidizing only life-saving abortions was superseded by Title XIX, specifically 42 U.S.C. § 1396a(a)(17) and 42 C.F.R. § 440.230 (1978). This conclusion is consistent with our decision today in *Hodgson v. Board of County Commissioners*, No. 79-1665 (8th Cir.), and we reject the bulk of defendants' arguments for the reasons expressed there.

Defendants raise three points, however, that were not raised in *Hodgson*.[8] First, defendants argue that we must reverse the district court because the issue of Title XIX's requirements was not raised by plaintiffs below. The complaint brought exclusively constitutional challenges to 13 C.R.S. § 40-80.100, and the only statutory issue the court requested the parties to brief concerned the effect of the Hyde Amendment, which proscribes federal spending for most abortions.

Nevertheless, we do not believe defendants were justified in believing that the constitutionality of 13 C.S.R. § 40-80.100 was the only issue before the court. In responding to the court's request to discuss the Hyde Amendment, the plaintiffs asserted the inconsistency of 13 C.S.R. § 40-80.100 with Title XIX. This occurred several months before the court's decision and defendants offer nothing to upset our presumption that they had adequate opportunity to respond. *Cf.* Fed. R. Civ. P. 15(b) (issues not pleaded but tried by implied consent are treated as if pleaded). Moreover, the constitutional challenge necessarily brought the interpretation of Title XIX into question. Interpreting

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[8]Defendants also argue that, because Title XIX endeavors to enable each state to provide medical assistance only "as far as practicable under the conditions of such State," 42 U.S.C. § 1396, Missouri has no obligation to subsidize abortions because conditions in Missouri made abortion subsidy *politically* impracticable. The contention that "political conditions" justify what is otherwise a violation of Title XIX is frivolous. Any violation of Title XIX could be so justified. The statutory language evidently recognizes a state's interest in fiscal integrity and administrative efficiency. It does not, in any event, excuse 13 C.S.R. § 40-80.100.

Title XIX to require subsidy of medically necessary abortions—a possibility explicitly raised by the Supreme Court one month before plaintiffs' complaint, *Beal v. Does*, 432 U.S. 438, 444 (1977)—would have made a constitutional argument unnecessary to consider. *See Ashwander v. TVA*, 297 U.S. 288, 346-48 (1936)(Brandeis, J., concurring) (courts traditionally prefer statutory to constitutional grounds). We therefore think the defendants were placed on notice that Title XIX's scope was being drawn into question.

A more substantial contention is that the Congress which enacted Title XIX could not have intended to require states to subsidize abortions because at the time of Title XIX's enactment, in 1965, most states criminally proscribed all but life-saving abortions.[9] Defendants rely on dictum in *Beal v. Doe, supra,* which considered it "relevant" that:

> [W]hen Congress passed Title XIX in 1965, nontherapeutic abortions were unlawful in most States. In view of the then-prevailing state law, the contention that Congress intended to require—rather than permit—participating States to fund nontherapeutic abortions requires far more convincing proof than [plaintiffs] have offered.

Id. at 447 (footnote omitted).

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[9]Parallel to this argument is defendants' curious reliance on 42 U.S.C. § 1396a(f), an obscure provision which states that, with some exceptions, no state is required to aid the "aged, blind, or disabled" who would not have been eligible for medical assistance on January 1, 1972, but that some of these individuals may be deemed eligible. Because most abortions in Missouri were illegal in 1972, defendants conclude that sub-section 1396a(f) excuses the restriction on abortion financing imposed by 13 C.S.R. § 40-81.100. This imaginative interpretation notwithstanding, both the express language of the subsection and its legislative history—*see* H.R. Rep. No. 92-231, 92d Cong., 2d Sess., *reprinted in* [1972] U.S. Code Cong. & Ad. News 4989, 4992-93, 5014—reveal that the subsection is designed to encourage, but not require, the participating state to broaden its class of aged, blind, and disabled medical assistance recipients by providing that the federal government will make the supplemental payments. The subsection does not generally freeze a state's medicaid obligations at those extant in the period before January 1, 1972.

Although one federal district court has cited this language in *Beal* in support of defendants' proposition—that Title XIX also permits a state to withhold subsidies for *therapeutic* abortions, *D.R. v. Mitchell*, 456 F. Supp. 609, 622 (D. Utah 1978)—we de not find defendants' argument persuasive. First, *Beal* expressly did not contemplate Title XIX's requirements concerning *therapeutic* services. 432 U.S. at 444-45. Second, *Beal's* language, when applied to *therapeutic* services, leads to the absurd result that Title XIX permits a participating state to withhold subsidies for any service, no matter how medically necessary, that was not legally available in 1965. We doubt that the Supreme Court would tolerate, for example, a Title XIX state's refusal to subsidize a medically essential prescription drug on the ground that it was not approved until after 1965. Excluding a form of medical service not because of the recipient's medical need, but solely because it was once not legally available, would contravene Title XIX's express directive that standards governing the extent of medical assistance be reasonable. 42 U.S.C. § 1396a(a)(17). We therefore believe that the Congress which enacted Title XIX intended to require that persons otherwise eilgible under a state plan receive all medical services legally available at the time they are needed.

Finally, defendants emphasize the formal approval by the Department of Health, Education and Welfare (HEW) of a previous Missouri Medicaid regulation, which stated that "[p]ayment is not made for abortions unless a licensed physician certifies to the Division of Family Services that continuation of the pregnancy will endanger the mother's life."

Defendants urge that 13 C.S.R. § 40-81.100, which has not yet been approved by HEW, is sufficiently similar to the prior regulation to invoke in its favor that the rule

that "[t]he construction put on a statute by the agency charged with administering it is entitled to deference by the courts, and ordinarily that construction will be affirmed if it has a 'reasonable basis in law.' *NLRB v. Hearst Publications*, 322 U.S. 111, 131 [(1944)]." *Volkswagenwerk v. FMC*, 390 U.S. 261, 272 (1968).

Assuming that HEW would approve 13 C.S.R. § 40-81.100, which appears significantly more restrictive than its predecessor, we cannot give the HEW interpretation much weight here. As the Supreme Court also stated in *Volkswagenwerk*, "the courts are the final authorities on issues of statutory construction, and 'are not obliged to stand aside and rubberstamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.' " *Id.* (citation omitted). In light of Title XIX's mandate that medical assistance be disbursed in accordance with reasonable standards of medical need, HEW's approval of a statutory scheme that alters its general standard of medical need with respect to a particular medically necessary procedure deserves little deference.

For the reasons stated here and in *Hodgson v. Board of County Commissioners, supra*, we again hold that Title XIX, as originally enacted, forbids a participating state to single out abortion subsidies for a more restrictive standard of medical need.

B. *The Effect of the Hyde Amendment*

The district court, after ruling that 13 C.S.R. § 40-80.100 was inconsistent with Title XIX, next considered whether Title XIX was substantively amended by the Hyde Amendment, Act of Oct. 18, 1978, Pub. L. No. 95-480, § 210, 92 Stat. 1586, which read:

> None of the funds [appropriated for the use of HEW] shall be used to perform abortions except where the

> life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest, when such rape or incest has been reported promptly * * *; or except in those instances where severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term when so determined by two physicians.[10]

The district court held that this language altered Missouri's abortion subsidy obligation under Title XIX.

This holding comports with the interpretation given the Hyde Amendment by the First Circuit in *Preterm, Inc. v. Dukakis, supra,* and the Seventh Circuit in *Zbaraz v. Quern,* 596 F.2d 196 (7th Cir. 1979), *petition for cert. filed,* 48 U.S.L.W. 3013 (U.S. July 24, 1979)(No. 79-64), which we followed in *Hodgson v. Board of County Commissioners, supra.*[11] We have examined plaintiffs' criticisms of the *Preterm-Zbaraz* rationale and find them unpersuasive for the reasons expressed in *Hodgson.*[12] We therefore affirm the district court on its Hyde Amendment holding.

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[10]The Hyde Amendment appeared in appropriations acts for fiscal years 1977-79; corresponding language in the appropriations act for fiscal year 1980 maintains the general proscription of abortion financing and differs from the language quoted in text only in that it contains no exception for abortions to prevent severe and long-lasting physical health damage. Act of Nov. 20, 1979, Pub. L. No. 96-123, § 109.

[11]The district court did not rely on the rationale used in *Preterm* and *Zbaraz*. Rather, the court relied on 42 U.S.C. §§ 1396(a) and 1396d(b) to hold that Title XIX—absent, we suppose, some express indication to the contrary—binds a participating state to subsidize only those medical procedures for which it will be reimbursed in accordance with the cost-sharing formula of Title XIX. The court thus held that the Hyde Amendment, by preventing reimbursement for non-Hyde Amendment abortions, automatically suspended any state obligation to subsidize these abortions. The parties' briefs did not discuss this novel interpretation, and we find it unnecessary to consider inasmuch as we affirm the district court's judgment on the basis of *Hodgson*.

[12]We also reject the suggestion that the substantive impact of the Hyde Amendment was determined in *Beal v. Doe,* 432 U.S. 438 (1977). True, the *Beal* Court did acknowledge the existence of a version of the Hyde Amendment while upholding, on other grounds, a Pennsylvania medicaid program

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III. The Constitutional Issue

The district court's final holding was that Missouri's policy of excluding medically necessary non-Hyde Amendment abortions from its medicaid coverage was constitutional. The court first observed that:

> The Constitution imposes no obligation on the States to pay the pregnancy-related medical expenses of indigent women, or indeed to pay any of the medical expenses of indigents. But when a State decides to alleviate some of the hardships of poverty by providing medical care, the manner in which it dispenses benefits is subject to constitutional limitations.

Maher v. Roe, 432 U.S. 464, 469-70 (1977). The court then analyzed the Missouri exclusion under the traditional equal protection analysis described in *San Antonio School District v. Rodriguez,* 411 U.S. 1, 17 (1973):

> [A court] must decide, first, whether [the policy] operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny. * * * If not, the [policy] must still be examined to determine whether it rationally furthers some legitimate, articulated state purpose and therefore does not constitute an invidious discrimination * * *.

Footnote continued
that subsidized only medically necessary abortions. *Id.* at 447 n.14. Plaintiffs argue that this disposition of the case demonstrates that the Hyde Amendment is not a substantive enactment. If it were, plaintiffs contend, the Court would have relied on it to uphold the Pennsylvania program. The Court's failure to do so, plaintiffs continue, means that the Hyde Amendment does not relieve states of their Title XIX obligations. One answer to this argument is that any holding that is not explained explicitly but is only arguably implicit in a decision can have but little precedential value. Further, and more fundamental, we do not think the Court's disposition in *Beal* necessarily implies that the Hyde Amendment has no substantive effect. The Court's decision not to rely on the Hyde Amendment as a ground for its decision does not mean that the Hyde Amendment would not have been an appropriate ground. In choosing the ground that it did, the Court chose but one of the available alternatives.

The court decided that strict scrutiny was inappropriate because the exclusion neither disadvantaged a suspect class nor impinged upon a fundamental right, and determined that the exclusion was valid because it rationally furthered Missouri's "strong and legitimate interest in encouraging normal childbirth" and in "protecting the life of the fetus" (citing *Maher v. Roe, supra,* 432 U.S. at 478).

The district court's is one of at least six recent federal decisions to have considered whether a state violates the Equal Protection Clause when it excludes medically necessary non-Hyde Amendment abortions from its medicaid program. In *Doe v. Percy,* No. 79-C-367 (W.D. Wis. Sept. 13, 1979), the court granted preliminary injunctive relief to the exclusion's challengers. The court held there was a strong likelihood that Wisconsin's payment of pregnancy expenses combined with its nonpayment of medically necessary abortion expenses would trigger strict scrutiny and that the state's classification could not be justified by a compelling state interest. In *Zbaraz v. Quern,* 469 F. Supp. 1212 (N.D. Ill. 1979), *review granted, juris. postponed,* 48 U.S.L.W. 3356 (U.S. Nov. 26, 1979)(Nos. 79-4, 5, 491), the court concluded that strict scrutiny did not apply but nonetheless struck down Illinois' medicaid exclusion (and the Hyde Amendment)[13] for failure to further a legitimate

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[13]The Supreme Court has agreed to hear, some months hence, appeals from *Zbaraz* that will raise the question whether the Hyde Amendment's restrictions on abortion financing are constitutional. We nonetheless proceed with this case because it is not certain that the Court will reach that issue, for it is not clear that the constitutionality of the Hyde Amendment was properly before the court in *Zbaraz.* Although the *Zbaraz* court permitted the United States to intervene and defend the Hyde Amendment's constitutionality, the court was not persuaded that the issue was squarely before it, and addressed the issue only because it was under the Seventh Circuit's mandate to do so. *Zbaraz v. Quern, supra,* 469 F. Supp. at 1215 n.3.

Our own constitutional holding, of course, does not touch the Hyde Amendment because the plaintiffs have not attacked it and because the United States is not a party, see 28 U.S.C. § 2403(a). We do acknowledge, however, that our judgment of the constitutionality of a Missouri statutory scheme paralleling the Hyde Amendment suggests what our judgment of the Hyde Amendment would be, were it properly before us.

governmental interest. In *D.R. v. Mitchell*, 456 F. Supp. 609 (D. Utah 1978), however, the court upheld Utah's medicaid exclusion on the basis that it reasonably advanced the state's legitimate interest in promoting childbirth. *Accord, Doe v. Mundy*, 441 F. Supp. 447 (E.D. Wis. 1977) (upholding constitutionality of county hospital rule permitting use of hospital facilities for abortion only where continuation of pregnancy threatens life of mother). And an early version of the Hyde Amendment withstood a constitutional attack in *Woe v. Califano*, 460 F. Supp. 234 (S.D. Ohio 1978).

As these decisions indicate, an equal protection challenge to Missouri's policy can be characterized in at least two ways. The favored class can be characterized as (1) those pregnant indigents who seek either childbirth or a Hyde Amendment abortion or (2) those indigents who seek medically necessary procedures other than abortions. In both cases the disfavored class would comprise those pregnant indigents who seek medically necessary non-Hyde Amendment abortions.[14] We conclude that, under either characterization, Missouri's legislative classification must fall as violative of the fourteenth amendment.[15]

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[14]Of course, still other classifications are possible. *See, e.g.*, Butler, *The Right to Medicaid Payment for Abortion*, 28 Hast. L.J. 931, 946-51 (1977) (classification among women seeking abortion, classification based on wealth).

[15]Plaintiffs' challenge, arising under the Equal Protection Clause of the fourteenth amendment, might also be put in terms of the Due Process Clause of that amendment. Due process and equal protection analyses are sometimes interchangeable. *Compare Zablocki v. Redhail*, 434 U.S. 374, 388-91 (1978) (invalidating restriction on freedom to marry of certain indigent fathers on equal protection rationale) *with id.* at 392-96 (Stewart, J., concurring) (due process is preferred mode of analysis where, as here, problem concerns not discriminatory classifications but unwarranted encroachment on constitutionally protected freedom); *compare Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-48 (1974) (invalidating mandatory maternity leave policy on due process rationale) *with id.* at 651-57 (Powell, J., concurring) (equal protection is the appropriate frame of reference where, as here, problem is one of irrational classification). We will follow the lead of the Supreme Court in *Maher v. Roe, supra*, and examine this problem of abortion financing in terms of equal protection. We believe the equal protection analysis is flexible enough to accommodate plaintiffs' due

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We consider first the classification made among the pregnant poor. We agree with the district court that Missouri's medicaid policy disfavoring certain pregnant indigents does not disadvantage a suspect class. *Maher v. Roe, supra,* 432 U.S. at 471 (indigency alone does not make a class suspect); *cf. Geduldig v. Aiello,* 417 U.S. 484 (1974) (pregnancy-based classifications are not tantamount to suspect sex-based classifications).

Whether the Missouri medicaid exclusion impinges upon a fundamental right is, as the district court acknowledged, a "closer question," and requires some understanding of the Supreme Court's decisions in *Roe v. Wade,* 410 U.S. 113 (1973), and *Maher v. Roe, supra.*

In *Roe v. Wade,* the Supreme Court recognized that a pregnant woman's interest in deciding to terminate her pregnancy through an abortion instead of through childbirth has the status of a "fundamental right" under the Constitution, and that any state impairment of that interest through criminal sanctions must be justified by a compelling state interest.[16] Although acknowledging that the state had potentially compelling interests at stake—such as protecting the pregnant woman's health after the first trimester of pregnancy and protecting fetal life after the point of fetal viability—the Court in *Wade* invalidated the state criminal statute before it on the basis that it broadly proscribed abortions (except for life-saving abor-

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process concerns. *Accord, Zbaraz v. Quern,* 469 F. Supp. at 1216 n.5. On appeal, plaintiffs do not press their arguments that the Missouri policy imposes cruel and unusual punishment on indigent women under the eighth amendment, deprives the physician-plaintiffs of their right to practice medicine under the first, fourth, fifth, ninth and fourteenth amendments, and is unconstitutionally vague and thus violative of due process. The district court summarily ruled that these and related constitutional claims were without merit. We have no occasion to address them here.

[16] *Wade,* of course, is a due process rather than an equal protection case, but provides a framework for deciding whether a state policy impinges upon a woman's fundamental interest in choosing abortion. *Maher v. Roe, supra,* 432 U.S. at 471-74.

tions) without regard for the woman's fundamental interest in the abortion choice.

In *Maher v. Roe,* the Court applied a more lenient "rational basis" standard in upholding a state's policy of subsidizing childbirth while refusing to subsidize nontherapeutic abortions. The Court explained that "the right in *Roe v. Wade* can be understood only by considering both the woman's interest and the nature of the State's interference with it." 432 U.S. at 473. The woman's interest in *Maher* was not as substantial as the woman's interest in *Wade. Wade* catalogued the detriments suffered by a woman denied her choice of abortion:

> Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved.

410 U.S. at 153. Only a portion of these detriments was suffered by the *Maher* plaintiffs, who were unable to obtain a physician's certificate that for them abortion was a medical necessity. Moreover, the form of the state interference in *Maher* was not as substantial as the criminal proscription involved in *Wade.* The *Maher* Court found "a basic difference between direct state interference with a protected activity [as in *Wade*] and state encouragement of an alternative activity consonant with legislative policy [as in *Maher*]." 432 U.S. at 475. Under this analysis, the

Maher Court concluded that even though the state policy of subsidizing childbirth while refusing to subsidize nontherapeutic abortions may influence the woman's constitutionally protected independent decision to seek an abortion, *id.* at 474, its classification triggered only a "reasonable basis" scrutiny. Applying this test, the Court reasoned that the state's classification reasonably furthered its legitimate interest in "encouraging normal childbirth." *Id.* at 479.

The case here differs from both *Wade* and *Maher*. Here, like *Wade* and unlike *Maher*, the woman's fundamental interest in seeking an abortion is magnified by her interest in preserving her own health, an interest which may itself be fudamental.[17] The potential effect of the state's policy is therefore to subject to the full spectrum of detriments catalogued in *Wade, supra*, 410 U.S. at 153, those pregnant poor who are denied medically necessary abortion benefits. To be sure, withholding medicaid benefits is not a *direct* interference. Still, the differential disbursement of government benefits deemed medically necessary is apt to have a strong influence on those who, by hypothesis, are unable to procure them through their own means.

> [I]t is at least clear that medical care is as much "a basic necessity of life" to an indigent as welfare assistance. And, governmental privileges or benefits necessary to basic sustenance have often been viewed as being of greater constitutional significance than less essential forms of governmental entitlements.

Memorial Hospital v. Maricopa County, 415 U.S. 250, 259 (1974) (footnote omitted). *Cr. Singleton v. Wulff*, 428 U.S.

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[17] *See, e.g., Roe v. Wade, supra*, 410 U.S. at 213 (Douglas, J., concurring) (among fundamental rights protected by the Constitution is "the freedom to care for one's health and person"); *see generally Whalen v. Roe*, 429 U.S. 589, 599-600 (1977) (Constitution implicitly protects "interest and independence in making certain kinds of important decisions").

106, 118-19 n.7 (1976) ("For a doctor who cannot afford to work for nothing, and a woman who cannot afford to pay him, the State's refusal to fund an abortion is as effective an 'interdiction' of it as would ever be necessary.")[18]

In declaring that there is a "basic difference" between direct interference with an activity, on the one hand, and discouragement of that activity through the subsidy of an alternative activity, on the other, the *Maher* Court laid down no per se rule. While the Court emphasized that the form of the state interference was significant in determining whether it impinged upon a fundamental right, the Court did not make the form of interference determinative.[19] Rather, in focusing on not only the form of state interference but also the woman's interest, 432 U.S. at 473, the Court recognized that the ultimate test of whether constitutionally protected interests are being impinged upon is not simply the form that the state interference takes but the effect that the interference exerts. The effect here, because significantly more substantial than that present in *Maher*, calls for judicial scrutiny that demands more than "minimal rationality."

> Though the latitude given state economic and social regulation is necessarily broad, when state statutory classifications approach sensitive and fundamental personal rights, this Court exercises a stricter scrutiny.

Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 172 (1972).

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[18]In examining the impact of Missouri's medicaid exclusion, we are not relying simply on the denial of benefits for medically necessary abortions; there is no constitutional right to a state-financed abortion. Rather, we are relying on that denial coupled with Missouri's subsidy of the alternative activity of continuing the pregnancy to term; there is a constitutional right to seek a medically necessary abortion—and also, we presume, to seek to preserve one's health—without undue governmental influence.

[19]The *Maher* Court acknowledged that "a state-created obstacle need not be absolute to be impermissible," 432 U.S. at 473, and that the constitutionality of an abortion-non-abortion distinction "will depend [in part] upon its *degree*," *id.* (quoting *Bellotti v. Baird*, 428 U.S. 132, 147 (1976)) (emphasis added).

To justify Missouri's medicaid exclusion for medically necessary non-Hyde Amendment abortions, defendants assert the state's interest in protecting fetal life.[20] Yet the Missouri subsidy scheme does not pursue that interest at all costs. The initial scheme authorized expenditure for life-saving abortions. And we have affirmed the district court's holding that Missouri's policy of excluding all non-life-saving abortions from its medicaid program is superseded by Title XIX as modified by the Hyde Amendment, meaning that Missouri must now also subsidize medically necessary abortions to terminate pregnancies that result from rape or incest.[21] Missouri presumably will continue

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[20]Defendants do not assert Missouri's interests in shepherding limited funds, see *Dandridge v. Williams*, 397 U.S. 471, 485 (1970), or in increasing its population growth, see *Maher v. Roe*, *supra*, 432 U.S. at 478 n.11. We think it apparent that neither interest is implicated here. Missouri's fiscal interest is not implicated because the state's choice of financing childbirth and refusing to finance abortion is, by nearly every indication, more expensive than the alternative of financing both. *See Hodgson v. Board of County Commissioners*, No. 79-1665, slip op. at 13 n.16 (8th Cir.); *but see D.R. v. Mitchell*, *supra*, 456 F. Supp. at 618-19. Nor can Missouri persuasively claim that it has an interest in promoting its population growth in light of its provision of family planning services and supplies. Mo. Ann. Stat. § 208.152(13) (Veron Supp. 1979).

[21]The most recent version of the Hyde Amendment relieves Missouri of any obligation to subsidize abortions to prevent severe and long-lasting physical health damage. *See* note 10 *supra*.

Although defendants do not raise the point on appeal, we note there is some controversy whether the Hyde Amendment permits funding of medically necessary abortions in cases of rape or incest. The Amendment permits funding for "such medical procedures necessary for the victims of rape or incest" but does not specify "abortion" funding for these victims, as it does in the case of women whose lives would be endangered by a continued pregnancy. In an amicus brief filed before the district court, HEW cited an opinion letter of the United States Attorney General, dated July 27, 1977, which interpreted an earlier version of the Hyde Amendment to authorize only those procedures that occur immediately after the incident, and not to encompass abortions in the conventional sense.

Courts that have spoken to the question, however, have concluded that "such medical procedures necessary" includes abortions. *E.g., Zbaraz v. Quern*, *supra*, 596 F.2d at 199 n.7; *Preterm, Inc. v. Dukakis*, *supra*, 591 F.2d at 127. The words of the Amendment support this interpretation. The Amendment first proscribes abortion funding generally and then excepts, *inter alia*, "medical procedures necessary" to treat victims of rape or incest. This phrase would include contemporaneous medical treatment that would prevent or terminate pregnancy, as the Attorney General suggests. This phrase would also include, if it is used in the commonly accepted sense, an abortion when an abortion is a medically necessary procedure, as it sometimes is. *See* notes 5 and 6 *supra*. Our interpretation is strengthened by

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to withhold subsidies for medically necessary abortions generally, which the Hyde Amendment permits it to do.

The resulting subsidy scheme seems to represent an attempt to harmonize the state's interest in protecting fetal life with the state's interest in the health of its pregnant poor. Assuming that protecting fetal life is a constitutionally permissible interest where a medically necessary abortion is concerned—a point we address later, *infra* at 25-30—we hold that the Missouri subsidy scheme fails rationally to promote that interest.

The Missouri scheme is irrationally underinclusive in that it generally denies subsidies to indigent women seeking medically necessary abortions but extends subsidies for medically necessary abortions to those indigent women whose pregnancies have resulted from rape or incest. In terms of either protecting fetal life or preserving the patient's health, there is no rational distinction between the woman who wants a medically necessary abortion because of rape or incest and the woman who wants such an abortion simply because she needs it to preserve her health. The Equal Protection Clause denies

> to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated

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other language in the Amendment, which provides that federal funds may be expended in the case of rape or incest only if the incident is "reported promptly to a law enforcement agency or public health service." This language contemplates that some medically necessary procedures would occur some time after the rape or incest and not be virtually contemporaneous with it. Otherwise there would seem no need for a prompt reporting requirement to ensure that claims of rape or incest are genuine.

alike." *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).

Reed v. Reed, 404 U.S. 71, 75-76 (1971). If Missouri is to subsidize medically necessary abortions for indigent women who are pregnant due to rape or incest, as it must under Title XIX, it must also subsidize medically necessary abortions generally in order to avoid invidious discrimination against those indigent women who are not victims of rape or incest. *Cf. Police Department of Chicago v. Mosley*, 408 U.S. 92, 99 (1972)(anti-picketing law's exception for peaceful labor picketing invalid under Equal Protection Clause because exception not rational in terms of state interest in regulating picketing's time, place and manner).

It is unnecessary to decide the rationality of adopting a former Hyde Amendment exception, in effect at the time this action was brought and decided in the district court, which permits abortion subsidy only if there will be severe and long-lasting health damage that is "physical" and that is prognosticated by two physicians. We do note, however, that the presumption that physical health detriments are deserving of attention but that menal health detriments uniformly are not is, in one court's opinion, "nothing less than absurd." *Preterm, Inc. v. Dukakis, supra*, 591 F.2d at 132. Moreover, no Supreme Court decision has countenanced a distinction drawn between abortions performed for physical health reasons only and abortions performed for mental health reasons.[22] We also observe that any

[22]We reject defendants' contention that the Missouri subsidy scheme is squarely supported by the Supreme Court's *per curiam* decision in *Poelker v. Doe*, 432 U.S. 519 (1977). True, the plaintiff in *Poelker* did suffer from fibroid tumors and polyps, an extremely retroverted uterus, and trichomycosis. *Doe v. Poelker*, 515 F.2d 541, 543 (8th Cir. 1975). And the defendant, the mayor of St. Louis, did declare that abortion was contrary to the public policy of Missouri and St. Louis except where necessary "to save the mother from grave physiological injury or death." *Id.* at 547 n.8.

Nevertheless, the Supreme Court did not consider the case as presenting a challenge to a government benefit scheme that excludes *thera-*

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two-physician-determination requirement would be suspect in light of *Doe v. Bolton*, 410 U.S. 179, 199-200 (1973). The factual setting of *Doe* was different, of course, but its language suggests that the instant two-physician requirement could survive under only the barest of minimal rationality standards.

We conclude, on the basis of the rape and incest exception, that Missouri's subsidy scheme, made to conform with Title XIX as altered by the Hyde Amendment, fails to promote, along rationally drawn lines, the state interests in protecting fetal life and preserving maternal health. Regardless of the appropriate level of scrutiny—and we have indicated our belief that some standard more stringent than rational basis test is appropriate here—the Missouri subsidy scheme does not survive an equal protection attack.

This is not the only analysis under which the Missouri scheme is unconstitutional. In *Zbaraz v. Quern*, 469 F. Supp. 1212 (N.D. Ill. 1979), *review granted, juris. postponed*, 48 U.S.L.W. 3356 (U.S. Nov. 26, 1979) (Nos. 79-4, 5, 491), the district court characterized an Illinois medicaid classification as one between indigents seeking medically necessary non-Hyde Amendment abortions and indigents

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peutic abortions. Despite plaintiff's condition, the physicians who examined her found no medical reason to justify an abortion. *Id.* at 543. Plaintiff's desired abortion was therefore termed as "non-therapeutic" by both this court, *id.* at 545, and the Supreme Court, 432 U.S. at 521. The Supreme Court's decision did not mention St. Louis' "grave physiological injury or death" standard, presumably because the plaintiff would have been denied access to the hospital facilities even under the more relaxed standard employed by the Connecticut medicaid scheme under review in *Maher v. Roe*, *supra*. The limited purpose of the Court's three page opinion in *Poelker* was to demonstrate that *Maher's* approval of withholding medicaid subsidies for non-therapeutic abortions also applies to a city's denial of hospital facilities. The Court explained, "[f]or the reasons set forth in our opinion in [*Maher*], we find no constitutional violation by the City of St. Louis in electing, as a policy choice, to provide publicly financed hospital services for childbirth without providing corresponding services for non-therapeutic abortions." 432 U.S. at 521. The Court thereby gave no approval to a scheme that would discriminate against "therapeutic abortions," as the Court has defined them, see note 6 *supra*.

seeking medically necessary procedures generally. The classification did not impinge upon a fundamental interest and was therefore subject only to the requirement that it rationally further a legitimate, articulated state purpose. The court assumed, as we have not, that the classification's relationship to the goal of protecting fetal life was sufficiently rational. But the court held that the classification's goal of protecting fetal life was not legitimate, at least where the fetus was not viable: "a State has [no] legitimate interest in promoting the life of a non-viable fetus in a woman for whom an abortion is medically necessary." *Id.* at 1219.

We substantially concur with this analysis, but perceive no support for a viable/non-viable distinction in the context of funding medically necessary procedures under Title XIX. We conclude that, regardless of the stage of pregnancy, a state has no constitutionally permissible interest in promoting the life of the fetus in a woman for whom an abortion is medically necessary to preserve health or life.

This conclusion follows the teachings of all relevant abortion decisions of the Supreme Court. The first case to intimate the relative weights of the state's interests in protecting fetal life and preserving the woman's health was *Roe v. Wade, supra. Roe* recognized the interest in fetal life as constitutionally permissible but concluded that it did not become "compelling," and thus sufficient to justify restrictions on abortions, until the point of viability—when the fetus would be able to survive outside the mother's womb. 410 U.S. at 163. Even at this point, however, the state may not go so far as to proscribe abortion "when [abortion] is necessary to preserve the life *or health* of the mother." *Id.* at 164 (emphasis added).[23]

[23]Although the logical relevance of the viable/non-viable distinction to the weight of the state's interest in protecting fetal life is not clear, *see,*

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The Court thus strongly implied that the state's interest in preserving the pregnant woman's health—presumably derived from the woman's own interest in preserving her health—was necessarily stronger than the state's interest in protecting fetal life. Although *Roe* arose in the context of abortion regulation, and not abortion funding, the lesson remains the same: whatever steps the state takes to promote its interest in protecting fetal life cannot be taken at the expense of the woman's health. The interest in protecting fetal life is thereby qualified, and might be better termed as an interest in encouraging "normal childbirth." Childbirth is "abnormal," under this term of art, when it poses, relative to abortion, a significant threat to the health or life of the mother. *See Roe v. Wade, supra,* 410 U.S. at 149.

This interpretation is consonant with the Court's carefully drafted opinions in *Beal v. Doe,* 432 U.S. 438 (1977), *Maher v. Roe, supra,* and *Poelker v. Doe,* 432 U.S. 519 (1977). In each case the Court upheld government policies that withheld aid for abortions that the Court consistently defined as non-therapeutic.[24] In each case the withholding was justified by the state's interest in "encouraging normal childbirth." *Poelker v. Doe, supra,* 432 U.S. at 521; *Maher v. Roe, supra,* 432 U.S. at 478; *Beal v. Doe, supra,* 432 U.S. at 446.

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e.g., L. Tribe, American Constitutional Law 927 (1978); Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade,* 82 Yale L. J. 920, 924-25 (1973), it is obviously authoritative for the purpose of determining when the state's interests in protecting fetal life outweighs the woman's interest in choosing abortion. We find no support for the *Zbaraz* court's conclusion that this distinction also determines the point at which a state's interests in protecting fetal life surpasses its interest in maternal health and thus becomes legitimate for purposes of promoting fetal life at the expense of maternal health. That the interest in fetal life somehow becomes stronger at viability does not necessarily mean that it thus surpasses in importance a competing interest in maternal health, which is also growing in substantiality as the pregnancy approaches term. *Roe v. Wade, supra,* 410 U.S. at 162-63.

[24]For indications of the Court's understanding of that term, see note 6 *supra* and cases cited.

The view that there is no legitimate state interest in promoting fetal life at the expense of maternal health is also supported by the Court's disposition in *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976). The Court in *Danforth* invalidated Missouri's statutory requirement that saline amniocentesis could not be used as an abortion technique after the first trimester of pregnancy. This requirement did not preclude abortions altogether, but available alternative abortion techniques were "significantly more dangerous and critical for the woman than the saline technique." *Id.* at 76. The requirement was therefore not reasonably related to the state's interest in promoting maternal health; rather, it was "designed to inhibit, and [had] the effect of inhibiting, the vast majority of abortions after the first 12 weeks." *Id.* at 79. It thus promoted fetal life, although the Court did not cast the matter in those terms. In invalidating the requirement, the Court strongly indicated that a state cannot elevate its interest in encouraging childbirth above its interest in maternal health.

That implication was made once more in *Colautti v. Franklin*, 439 U.S. 379 (1979); decided last Term. The Court in *Colautti* invalidated for vagueness a Pennsylvania criminal statute that required any physician who performed an abortion to exercise due care to preserve fetal health and life "so long as a different [abortion] technique would not be necessary in order to preserve the life or health of the mother." *Id.* at 397. The statute as a whole failed to make clear whether it permitted the physician to prefer the woman's life and health to the fetus' life and health when they conflicted or whether it required the physician to accept greater risks to maternal health in order to increase the likelihood of fetal survival. *Id.* at 400. The Court declared that the latter requirement would create "[s]erious ethical and constitutional difficulties."

Id. We think this statement is a pointed, if not wholly unambiguous, reaffirmation of the principle that a state may not promote fetal life at the expense of maternal health.

We therefore rule that Missouri's medicaid exclusion for therapeutic non-Hyde Amendment abortions is invalid under the Equal Protection Clause not only because it invidiously discriminates against the pregnant and medically needy who are not victims of rape or incest, but also because it singles out for exclusion one procedure medically necessary to preserve health without furthering a legitimate state interest in doing so. The interest promoted by the exclusion—protecting fetal life—is not a constitutionally permissible objective when the pregnant woman's life or health is at stake.

Although we are naturally reluctant to overturn legislation on the basis that it furthers no legitimate state interests, the signals from the Supreme Court's abortion decisions are strong. Here, as elsewhere, there are governmental goals which, while salutary in themselves, simply cannot be promoted, no matter how rational the means, at the expense of weightier interests. *Cf., e.eg., Zablocki v. Redhail*, 434 U.S. 374, 395 (Stewart, J., concurring in the judgment) (state's legitimate concern with financial soundness of prospective marriage "must stop short" of denying marriage licenses to individuals because they are too poor). Moreover, even were we writing on a clean slate, we would be constrained to find that this is an area in which sensitive judicial review is particularly appropriate. The minority disadvantaged by Missouri's medicaid exclusion is sex-specific and financially destitute; and legislative arguments disfavoring abortion tend to draw heavily on religious assumptions, *see Roe v. Wade, supra,* 410 U.S. at 150, 160-62; Tribe, *The Supreme Court—1972 Term—Foreword: Toward a Model of Roles in the Due Process of Life*

and Law, 87 Harv. L. Rev. 1, 20-25 (1973); *cf. United States v. Vuitch,* 402 U.S. 62, 78-80 & nn.1,2 (White, J., concurring). These factors suggest "a special condition which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." *United States v. Carolene Products,* 304 U.S. 144, 152-53 n.4; *see* L. Tribe, American Constitutional Law 929-30, 1071 n.6 (1978). Any strong deference to the legislative process seems especially inapt where the minority asserts not only the fundamental interest in deciding whether to bear a child, which was the case in *Maher,* but the additional interest in preserving one's own health. Thus, although the *Maher* Court counseled deference to the legislative process where the funding of *non-therapeutic* abortions is concerned, 432 U.S. at 479-80, there obviously is a point at which judicial intervention in the abortion controversy is appropriate. *See generally Roe v. Wade, supra.* We believe that point is reached when a state singles out therapeutic abortions for exclusion from its medicaid program for the poor.

Defendants and amici contend that requiring subsidy for therapeutic abortions will subvert the Supreme Court's holdings in *Maher v. Roe, supra,* and *Poelker v. Doe, supra,* by permitting physicians to certify as therapeutic abortions that are in fact purely elective. Whether our holding will be subject to this abuse we cannot portend. Remedies for abuse lie both within the medical profession and in Title XIX, 42 U.S.C. § 1396h. *See generally Roe v. Wade, supra,* 410 U.S. at 166; *Zbaraz v. Quern, supra,* 469 F. Supp. at 1221.

IV. Attorneys' Fees

Plaintiffs brought this action under 42 U.S.C. § 1983. The district court awarded plaintiffs $4,442.50 in attorneys'

fees. Under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, a district court has discretion to award "a reasonable attorney's fee" to "the prevailing party" in actions brought under certain civil rights statutes, one of which is section 1983, *Simpson v. Weeks,* 570 F.2d 240, 244 n.4 (8th Cir. 1978).

The district court awarded plaintiffs attorneys' fees because they prevailed on their claim that the Missouri regulation is contrary to Title XIX, although the scope of relief was restricted under the court's interpretation of the Hyde Amendment. Citing *Lund v. Affleck,* 442 F. Supp. 1109, 1113 (D.R.I. 1977), the district court decided that plaintiffs' lack of success below on their substantial constitutional claim was no bar to an award of attorneys' fees. We agree. *See generally Kimbrough v. Arkansas Activities Association,* 574 F.2d 423 (8th Cir. 1978).

The reasonableness of the district court's computation of the attorneys' fee is not disputed. Nor have defendants shown "special circumstances [that] would render such an award unjust." *Wharton v. Knefel,* 562 F.2d 550, 557 (8th Cir. 1977). Finally, we do not believe the district court abused its discretion in awarding attorneys' fees based on all of the plaintiffs' attorneys' work and not just on the substantial claim on which they were successful. *See Brown v. Bathke,* 588 F.2d 634, 638 (8th Cir. 1978).

Affirmed in part, reversed in part, remanded for injunctive relief in accord with this opinion.

McMANUS, District Judge, concurring in the result.

I concur in the majority's opinion affirming the trial court's award of attorney's fees. With respect to that portion of the opinion reversing the trial court on the merits of the abortion funding claim, I concur in the result but for different reasons.

First, I am in agreement with the majority and the trial court that the Missouri regulation as written in inconsistent with Title XIX (Medicaid) as enacted. I do not agree that the Hyde Amendment (Hyde) is a substantive amendment of Medicaid, as the majority holds and that the trial court apparently held. In short, I view Hyde as having no effect on Medicaid. My reasons for so viewing Hyde have been stated in my dissent in our accompanying case of *Hodgson v. Board of County Commissioners,* ____ F.2d ____ (8th Cir.) (No. 79-1665) and need not be reiterated here. *See also Preterm, Inc. v. Dukakis,* 591 F.2d 121, 134-38 (1st Cir. 1979) (Bownes, J., dissenting); *Planned Parenthood Affiliates v. Rhodes,* 477 F. Supp. 529, 537-39 (S.D. Ohio 1979)(Kinneary, J., presiding); *Doe v. Busbee;* 471 F. Supp. 1326, 1332-34 (N.D. Ga. 1979)(Murphy, J., presiding).

Furthermore, I am of the opinion that the ruling below should have been limited to holding that the Missouri regulation is void and unenforceable because inconsistent with Medicaid as enacted. I am of the view that the trial court exceeded its equitable discretion by judicially amending the state regulation to conform to Medicaid as supposedly affected by Hyde. Thus, in light of my view of the case and what should have been the limited holding below, I would reverse on that basis alone and see no need to reach the constitutionality of the state regulation.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX 2

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 79-1275 and 79-1346

SEPTEMBER TERM, 1979

REPRODUCTIVE HEALTH SERVICES, et al., *Appellants, Cross-Appellees,* v. DAVID R. FREEMAN, Director, etc., et al., *Appellees, Cross-Appellants.*	**Appeals from the United States District Court for the Western District of Missouri**

Upon petition for rehearing of appellants and cross-appellees, Reproductive Health Services and Robert H. Duemler, M.D., for an allowance of attorney's fees and costs, and the response thereto, it is ordered that attorney's fees be allowed in the amount of $3,000 and that costs be allowed in the amount of $1,393.01, for a total allowance of $4,393.01.

February 11, 1980.

APPENDIX 3

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF MISSOURI

CENTRAL DIVISION

MICHAEL FRIEMAN, M.D. et al., *Plaintiffs,* vs. JAMES F. WALSH, et al., *Defendants.*	**No. 77-4171-CV-C**

OPINION AND ORDER

The State of Missouri, by statutory and regulatory law[1], has taken the position that no public funds are to be spent on abortions unless "the attending physician in the exercise of his best clinical, medical judgment believes a full-term pregnancy and childbirth would cause cessation of the mother's life."[2]

Plaintiffs Freiman and Duemler (medical doctors actively engaged in the medical practice of obstetrics and gynecology in the St. Louis area) and plaintiff Reproductive Health Services (a Missouri not-for-profit corporation which operates and maintains an out-patient, first-trimester abortion facility) state that they presently provide

and perform pregnancy termination procedures to numerous patients who are eligible for Missouri medicaid assistance. Plaintiffs contend that the vast majority of these abortions were medically necessary and medically indicated in light of all factors which plaintiffs feel, in their professional, medical judgment, are relevant to the patients' well-being: physical, emotional, psychological, familial, and the woman's age. Plaintiffs further assert that "the performance of an abortion as necessary to prevent cessation of the patient's life is not today a medical reality."

Based on these and other facts alleged in their Complaint, plaintiffs state that the above-quoted regulation should be declared violative of the United States Constitution and ask that this Court issue appropriate Orders restraining defendants from enforcing it.

Specifically, plaintiffs contend that the regulation:

(a) denies to plaintiffs and their patients due process and equal protection of the laws;

(b) is unconstitutionally vague and uncertain on its face, in violation of the Fourteenth Amendment;

(c) deprives plaintiffs and their patients of the right to privacy in the physician-patient relationship, "as protected by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments to the United States Constitution";

(d) deprives plaintiffs of the right to practice medicine according to the highest standards of medical practice, "as guaranteed by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments to the United States Constitution";

(e) deprives plaintiffs' patients of their fundamental right to determine whether to bear children;

(f) deprives plaintiffs' patients of their right to receive safe and adequate medical advice and treatment pertaining to whether to carry a given pregnancy to term and the method of termination;

(g) imposes a cruel and unusual punishment upon indigent Missouri medicaid eligible women by forcing and coercing them to bear each pregnancy they conceive; and

(h) bears no rational relationship to any legitimate state interest.

Also at issue is whether the Missouri laws here at issue are violative of Title XIX of the Social Security Act, 42 U.S.C. §§ 1396 et seq., (the Medicaid Act).

Whether and to what extent the various levels of government should fund abortions is a hotly debated issue, rife with social and religious implications. A resolution of that issue, is, however, beyond the competence of this Court. Those who would insist upon a judicial resolution of such an issue simply "misconceive . . . the role of the judiciary." Beal v. Doe, 432 U.S. 438, 447, 97 S. Ct. 2366, 53 L. Ed. 2d 464, 474, fn. 15 (1978).[3]

Accordingly, the issues before this Court are legal in nature and narrow in scope; the policy decisions have been and will be made elsewhere.

With this in mind, a resolution of the issues presented to the Court by this cause will now be made.

I

DOES MISSOURI LAW CONTRAVENE TITLE XIX OF THE SOCIAL SECURITY ACT?

Title XIX of the Social Security Act,[4] which establishes the Medicaid Program, creates a framework whereby participating states,[5] with the aid of federal funds, pro-

vide medical services to certain needy persons. A state need not participate in the Medicaid program, but once it chooses to do so, it must comply with applicable federal law.

While the Medicaid program gives states broad discretion in adopting standards for determining the extent of medical assistance to be provided, this discretion is not unfettered: the standards must be "reasonable" and "consistent with the objectives" of the Act. 42 U.S.C. §1396a (a)(17). Futher, the regulations promulgated by the Secretary of Health, Education and Welfare pursuant to Title XIX provide that a state which participates in the Medicaid program "may not arbitrarily deny or reduce the amount, duration, or scope of, such services to an otherwise eligible individual solely because of the diagnosis, type of illness or condition." 42 C.F.R. § 449.10(a)(5)(i).

The State of Missouri has drawn to this Court's attention no other illness or condition where the attending physician must certify, as a prerequisite to his patient's qualifying for Medicaid assistance, that nontreatment of the illness or condition would "cause cessation of the [patient's] life." As the Court stated in Preterm, Inc. v. Dukakis, No. 78-1324, slip op. at 10 (1st Cir. Jan. 15, 1979):

> "When a state singles out one particular medical condition—here, a medically complicated pregnancy—and restricts treatment for that condition to life and death situations it has, we believe, crossed the line between permissible discrimination based on degree of need and entered into forbidden discrimination based on medical condition.
>
> * * *
>
> "We find it 'unreasonable' and wholly '[in]consistent with the objectives of the Act', 42 U.S.C. Section 1396a (a)(17), for a state to provide abortion services and

then, with limited exceptions for victims of rape and incest,[6] deny it to all those who will not die without it. We know of no other instance where a legislative decision to pay for medical care is based on the distinction between life and death."

Plaintiffs, therefore, must prevail on their claim that the State of Missouri has, in limiting public funding of abortions to those instances where "a full-term pregnancy and childbirth would cause cessation of the mother's life," transgressed the dictates of Title XIX and the regulations promulgated thereunder.

II

RELIEF

As plaintiffs request the issuance of a declaratory judgment and a permanent injunction restraining the enforcement of the state laws in question, this Court must be guided by and apply equitable principles in formulating the appropriate remedy.[7]

To order the State of Missouri to fund all abortions of needy persons where the attending physician certifies that the abortion is "medically necessary" would be, in view of the Hyde Amendment, highly inequitable—or, as Judge Caffrey put the matter—"it would be anomalous." Jaffe v. Sharp, No. 78-1637-C, slip op. at 14 (D. Mass. July 28, 1978), affirmed in part, remanded in part, sub nom. Preterm, Inc. v. Dukakis, supra.

The Hyde Amendment, Section 101 of Pub. L. 95-205, 91 Stat. 1460 (the appropriations act for the Department of Health, Education and Welfare for fiscal year 1978),[8] provides:

"None of the funds contained in this Act shall be used to perform abortions except when the life of the mother would be endangered if the fetus were carried

to term; or except for such medical procedures necessary for the victims of rape or incest, when such rape or incest have been reported promptly to a law enforcement agency or public health service, or except in those instances where severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term when so determined by two physicians."

Plaintiffs argue that "the impact of the Hyde Amendment has been merely to withdraw federal funding contributions from the costs of those abortions still required to be performed under state Medicaid programs (i.e., medically necessary abortions). The costs of such abortions must be met 100% by the state itself, as a condition of state participation in and federal funding by Medicaid generally."

Plaintiffs' view of the Hyde Amendment and its effect on state obligations under Medicaid has received support in some of the cases. For instance, in Doe v. Mathews, 422 F. Supp. 141 (D.D.C. 1976), the Court, at 143, 146, stated:

"The Hyde Amendment appears to be simply a limitation on the Federal government's undertaking under Title XIX to reimburse the jurisdictions participating in the Medicaid program.

* * *

" . . . Title XIX only binds the federal government to reimburse the states '[f]rom the sums appropriated therefor.' 42 U.S.C. § 1396b(a)(1970). A state, then, may have assumed the risk, in setting up its medical assistance program, of in fact paying for a somewhat greater share of the cost of the program than it might have originally anticipated."[9]

The District Court in Zbaraz v. Quern, No. 77-C-4522, slip op. at 12 (May 15, 1978) (appeal pending before Seventh Circuit), quickly dismissed the argument that the Hyde Amendment affects obligations imposed by Title XIX with the observation: "Limitations on the use of funds in an appropriations bill will not suspend statutory obligations."

Plaintiffs position was rejected, however, by the First Circuit in Preterm, Inc. v. Dukakis, supra, where the majority, after an extensive review of the Congressional debates, concluded that "the Hyde Amendment was intended as more than a cost-shifting device." Id., slip op. at 26. At 25-26, the majority held:

> "that the legislative history of the Hyde Amendment is consistent with the cooperative federal-state structure of the Medicaid Act and reveals that the Amendment constituted a substantive policy decision concerning the public funding of abortions which left the states free to fund more abortions than those for which federal funds were made available by the Amendment, but did not require them to do so. The Medicaid Act, to the extent of its repugnancy with the Hyde Amendment, has therefore been altered by the Amendment."

After a careful review of the applicable law, this Court is of the opinion that the Hyde Amendment, *even when viewed purely as an appropriations act,* does *not* cause there to be imposed upon participating states the burden of providing 100% of the funding for all medically necessary abortions for which federal reimbursement is precluded by the Amendment. In arriving at this conclusion, this Court necessarily disagrees with the proposition that a state "[a]ssumes the risk, in setting up its medical assistance program, of in fact paying for a somewhat greater

share of the cost of the program than it might have originally anticipated." Doe v. Mathews, supra, at 146. Just as Title XIX only binds the federal government to reimburse the states '[f]rom the sums appropriated therefor.' 42 U.S.C. §1396b(a) (1970)," Id., at 146, Title XIX, in this Court's judgment, only binds the states to fund those medical procedures for which it will be reimbursed in accordance with the sharing formula set out in Title XIX. See 42 U.S.C. §1396b(a) and §1396d(b).[10]

Viewed purely as an appropriations act (as plaintiffs argue it should be viewed), the Hyde Amendment can have no effect whatsoever on the rights conferred upon the participating states by the substantive sharing provisions of Title XIX. Just as Title XIX imposes upon the States a great many obligations, so does it confer upon them certain rights and protections.

While addressing the matter from a dramaticlly different approach than does this Court, the First Circuit emphasized, as does this Court, that the Federal-State fiscal partnership is the most fundamental aspect of the Medicaid program. In Preterm, Inc. v. Dukakis, supra, slip op. at 22, the Court stated:

> "[We do not embrace plaintiffs'] reading of the [Hyde] Amendment as a mere withdrawal of federal monies. Although that reading may permit the Hyde Amendment and the Medicaid Act to co-exist facially by effecting no change in the Act's requirements for state plans, it requires us to do violence to the Medicaid Act on a more pervasive and fundamental level than would result from reading the Amendment as a substantive alteration of those requirements. The Medicaid program is one of federal and state cooperation in funding medical assistance; a complete withdrawal of the federal prop in the system with the intent to

drop the total cost of providing the service upon the states, runs *directly counter to the basic structure of the program* and could seriously cripple a state's attemps to provide other necessary medical services embraced by its plan." [emphasis added; footnote omitted]

The First Circuit also cites that portion of McRae v. Mathews, 421 F. Supp. 433, 538 (E.D.N.Y. 1976), vacated and remanded on other grounds, sub nom. Califano v. McRae, 433 U.S. 916, 97 S. Ct. 2993, 53 L. Ed. 2d 1103 (1977), wherein Judge Dooling repected the argument that the Hyde Amendment for Fiscal Year 1977 had not altered a state's obligation to fund abortions otherwise required to be funded under the Medicaid Act because:

"The argument overlooks the essential nature of the Medicaid legislation. The state and federal governments are linked in a fiscal partnership to provide for medical assistance to the needy; the program is based on the federal initiative, and the funding is primarily federal (42 U.S.C. §§ 1396, 1396d(b))."[11]

While Congress might choose to amend the substantive sharing formula set forth in §1396d(b) and while a state which chose to participate in the Medicaid program would be bound by that new sharing formula, no argument has been made—nor could such an argument be made—that Congress, through the Hyde Amendment, intended to effect an alteration of the substantive sharing formula set forth in §1396d(b).

Thus, while plaintiffs prevail on the merits of this cause, the relief afforded will be limited in nature; that is, while the Missouri statutory and regulatory laws limiting public funding of abortions are violative of Title XIX, this Court views the applicable federal law as requiring

that Missouri fund abortions for the needy only insofar as it will receive reimbursement therefor pursuant to the substantive sharing formula set forth in the Medicaid statute. To the extent that the Hyde Amendment withdraws federal funding of Medicaid abortions, Missouri is thereby relieved of its burden to contribute its share to fund such abortions.

Nor does this Court believe that the Missouri laws here in question, when thus made consistent with the Hyde Amendment, run afoul of the Constitution.

In applying Equal Protection analysis to the facts of this case, it should be initially observed that

> "The Constitution imposes no obligation on the States to pay the pregnancy-related medical expenses of indigent women, or indeed to pay any of the medical expenses of indigents. But when a State decides to alleviate some of the hardships of poverty by providing medical care, the manner in which it dispenses benefits is subject to constitutional limitations."

Maher v. Roe, 432 U.S. 464, 469—470, 97 S. Ct. 2376, 53 L. Ed. 2d 484, 492 (1977). Further, strict judicial scrutiny will be applied to governmental classifications where the classification "operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution." San Antonio School District v. Rodriguez, 411 U.S. 17, 93 S. Ct. 1278, 36 L. Ed. 2d 16, 33 (1973). If no suspect class or fundamental Constitutional right is involved, the classification in question "must still be examined to determine whether it rationally furthers some legitimate, articulated state purpose and therefore does not constitute an invidious discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment." San Antonio School District v. Rodriguez, supra, at 17, 36 L. Ed. 2d at 33.

Clearly, the Missouri scheme, as made consistent with the Hyde Amendment, does not operate to the disadvantage of some suspect class, for the Supreme Court "has never held that financial need alone identifies a suspect class for purposes of equal protection analysis." Maher v. Roe, supra, at 471, 53 L. Ed. 2d at 492—93. Whether that scheme "impinges on a fundamental right explicitly or implicitly protected by the Constitution" is a closer question.

Plaintiffs rely on, *inter alia*, Shapiro v. Thompson, 394 U.S. 618, 89 S. Ct. 1322, 22 L. Ed. 2d 600 (1969) and Memorial Hospital v. Maricopa County, 415 U.S. 250, 94 S. Ct. 1076, 39 L. Ed. 2d 306 (1974) to support their position that a state which will fund the childbirth expenses of an indigent but not the expenses of certain therapeutic abortions impinges on a fundamental right explicitly or implicitly protected by the Constitution. These cases are not applicable to the one now before this Court, however. As the Court in Maher v. Roe, supra, observed at 474, fn. 8, 53 L. Ed. 2d at 495:

> "But the claim here is that the State 'penalizes' the woman's decision to have an abortion by refusing to pay for it. Shapiro and Maricopa County did not hold that States would penalize the right to travel interstate by refusing to pay the bus fares of the indigent travelers. We find no support in the right-to-travel cases for the view that Connecticut must show a compelling interest for its decision not to fund elective abortions."

At 475—76, 53 L. Ed. 2d at 495—96, the Court in Maher v. Roe, supra, emphasized:

> "There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legisla-

tive policy. Constitutional concerns are greatest when the State attempts to impose its will by force of law; the State's power to encourage actions deemed to be in the public interest is necessarily far broader."

Plaintiffs also place reliance upon the Supreme Court's 1973 decisions Roe v. Wade, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 and Doe v. Bolton, 410 U.S. 179, 93 S. Ct. 739, 35 L. Ed. 2d 201. It is, of course, true that the Supreme Court "has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution," and that "[t]his right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." Roe v. Wade, supra, at 152, 153, 35 L. Ed. 2d at 176, 177. But again, the Court in Roe v. Wade was concerned with "[t]he detriment that the State would impose upon the pregnant woman by denying this choice altogether," a matter wholly distinct from the issue now facing this Court. As the Court explained in Maher v. Roe, supra, at 473—474, 53 L. Ed. 2d at 494:

"[T]he right in Roe v. Wade can be understood only by considering both the woman's interest and the nature of the State's interference with it. Roe did not declare an unqualified "constitutional right to an abortion," as the District Court seemed to think. Rather, the right protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy. It implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds."

Just as the Supreme Court in Maher v. Roe concluded that "the Connecticut regulation does not impinge upon

the fundamental right recognized in Roe [v. Wade],'' Id. at 474, 53 L. Ed. 2d at 495, so too must this Court conclude that the Missouri scheme here at issue (as construed consistently with the dictates of the Hyde Amendment) fails to impinge on the fundamental privacy right recognized in Roe v. Wade.

Accordingly, for plaintiffs to prevail on their Equal Protection claim, they must demonstrate that the Missouri scheme (as construed to be consistent with the Hyde Amendment) fails to rationally further some legitimate state objective. San Antonio School District v. Rodriguez, supra, at 17, 36 L. Ed. 2d at 33. This plaintiffs have failed to do.

As the Supreme Court has noted, a state may have a ''strong and legitimate interest in encouraging normal childbirth.'' Beal v. Doe, supra, at 446, 53 L. Ed. 2d at 473, Maher v. Roe, supra, at 478, 53 L. Ed. 2d at 497. The State has a ''strong interest in protecting the life of the fetus,'' and ''[t]hat interest exists throughout the pregnancy, 'grow[ing] in substantiality as the woman approaches term.''' Maher v. Roe, supra, at 478, 53 L. Ed. 2d at 497 (quoting from Roe v. Wade, supra). The Court further observed in Maher v. Roe, supra, at 478, fn. 11, 53 L. Ed. 2d at 497:

> ''In addition to the direct interest in protesting the fetus, a State may have legitimate demographic concerns about its rate of population growth. Such concerns are basic to the future of the State and in some circumstances could constitute a substantial reason for departure from a position of neutrality between abortion and childbirth.''

That Missouri has a long history of favoring childbirth over abortion is clear. That this is a legitimate, constitutionally permissible stance is beyond dispute. That the

Missouri scheme here at issue (as made consistent with the Hyde Amendment) rationally furthers this legitimate goal is likewise clear. Consequently, the conclusion is compelled that the Missouri scheme, as modified, does not transgress the Equal Protection Clause of the Fourteenth Amendment.

That this result is the proper one receives further support from Poelker v. Doe, 432 U.S. 519, 97 S. Ct. 2391, 53 L. Ed. 2d 528 (1977), reversing Doe v. Poelker, 515 F.2d 541 (8th Cir. 1975). In that case, plaintiff had been denied an abortion at a city-owned hospital in St. Louis, Missouri as the result of a policy directive by the Mayor and a long-standing staffing practice at the hospital involved. "The directive, communicated to the Director of Health and Hospitals by the Mayor, prohibited the performance of abortions in the city hospitals *except when there was a threat of grave physiological injury or death to the mother.*" Poelker v. Doe, supra, at 520, 53 L. Ed. 2d at 530 [emphasis added]. The plaintiff in that case "was suffering from cervical fibroid tumors and polyps, an extremely retroverted uterus and trichomycosis," Doe v. Poelker, supra, at 543, but "none of [the students and doctors who saw her at the clinic] found any 'medical reasons' to justify an abortion, defining such reasons as severe sickness of the patient such as 'severe diabetes,' 'severe heart condition' or 'something of that type.' " Id., at 543.

The Supreme Court labeled those abortions which the policy directive of the Mayor prohibited (i.e., those abortions which were *not* necessary to save the life of the mother or to prevent grave physiological injury) as "elective," *see* 432 U.S. at 520, 53 L. Ed. 2d at 530, or "nontherapeutic," Id., at 521, 53 L. Ed. 2d at 531, and concluded, at 521, 53 L. Ed. 2d at 531:

"For the reasons set forth in [Maher v. Roe, supra],

we find no constitutional violation by the city of St. Louis in electing, as a policy choice, to provide publicly financed hospital services for childbirth without providing corresponding services for nontherapeutic abortions.

* * *

"[The Mayor's] policy of denying city funds for abortions such as that desired by Doe is subject to public debate and approval or disapproval at the polls. We merely hold, for the reasons stated in Maher, that the Constitution does not forbid a State or city, pursuant to democratic processes, from expressing a preference for normal childbirth *as St. Louis has done.*" [emphasis added]

The same result on the Constitutional issue was reached by Judge Gordon in Doe v. Mundy, 441 F. Supp. 447 (E.D. Wis. 1977), appeal dismissed, ____ F.2d ____ (7th Cir. 1978). In that case, the Court was faced with a County Hospital's rule that provided, in part, that "[p]regnancy may be terminated therapeutically if it is complicated by medical conditions of such nature and advanced to such degree that continuation of pregnancy threatens the life of the mother." Judge Gordon, after carefully examining the recent Supreme Court cases on abortion, concluded, at 452:

". . . *Beal, Maher,* and *Poelker* declared no constitutional violation in the failure to provide funding for medically necessary abortions.

"It follows that the county may choose to fund the medical aspects of childbirth and decline to fund the performance of any abortion which is not required because of a threat to a woman's life imposed by continuation of her pregnancy. Accordingly, I find that the plaintiffs cannot prevail on the merits of their

claims that rule 26(b) and resolutions A and B violate the due process or equal protection clauses. The decisions in *Maher* and *Poelker* appear to me inescapably to foreclose these claims."

The District Court in D. R. v. Mitchell, 456 F. Supp. 609 (D. Utah 1978) reached the same result. It was the opinion of that Court that there was a fundamental distinction drawn by the Supreme Court in its 1977 abortion decisions between a State's prohibiting the performance of certain abortions and a State's refusal to provide funding for certain abortions while simultaneously funding childbirth expenses. As the District Court concluded, at 615:

> "Persons in this country have many rights which they may exercise freely in the sense that a government cannot prohibit the exercise of the respective rights. This does not mean, however, that the government has a corresponding duty to *fund* the exercise of that right. Likewise, the state's refusal to pay for the exercise of the right does not limit, penalize or prohibit the exercise of that right *in the constitutional sense*. . . . It is the opinion of this court that the failure to distinguish these concepts would make the Constitution 'a mandate for governmental interference, rather than a bulwark against it.'" [first emphasis in the original, second emphasis supplied by this Court; citations omitted]

In summary, this Court holds that it is not violative of the Equal Protection Clause for a state to pay for an indigent's childbirth expenses while refusing to fund the expenses incurred by an indigent to obtain an abortion "except when the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest, when such rape or incest have been reported promptly to

a law enforcement agency or public health service, or except in those instances where severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term when so determined by two physicians."

The Court has considered plaintiffs' remaining Constitutional arguments and is firmly convinced that they, too, should be denied.

III

ORDER

For the reasons above-stated, this Court must declare the Missouri regulation here at issue to be contrary to the federal Medicaid Act (Title XIX of the Social Security Act), 42 U.S.C. §§1396, et seq. Further, the Court must, and it hereby does, enjoin defendants from enforcing the aforesaid regulation except insofar as it is consistent with the language of the current Hyde Amendment. Defendants are further ordered to provide funding for all abortions for which the federal government contributes its share pursuant to the Medicaid Act and to continue to provide such funding for so long as it is a participant in the federal Medicaid Program.

IT IS SO ORDERED.

Elmo B. Hunter
JUDGE

FOOTNOTES

(as amended by Nunc Pro Tunc of January 29, 1979)

[1]By statute, Missouri has provided that no Medicaid funds are to be expended for abortions "unless such abortions are medically indicated." R.S. Mo. §208.153(12). By regulation, the State has declared that " ' [m]edically indicated' shall mean where the attending physician in the exercise of his best clinical, medical judgment believes a full-term pregnancy and childbirth would cause cessation of the mother's life." 13 C.S.R. §40-81.100.2.

[2]13 C.S.R. §40-81.100.2.

[3]After ruling that neither Title XIX nor the Equal Protection Clause requires that states fund elective abortions, the Supreme Court, in Beal v. Doe, supra, at 448, fn. 15, 53 L. Ed. 2d at 474, concluded:

"But we leave entirely free both the Federal Government and the States, through the normal processes of dmocracy, to provide the desired funding. *The issues present policy decisions of the widest concern. They should be resolved by the representatives of the people, not by this Court.*" [emphasis added]

[4]42 U.S.C. §§1396 et seq.

[5]Missouri is a participating state. *See* R.S. Mo. §208.151 et seq.

[6]Missouri does not even allow for these exceptions.

[7]In Abbott Laboratories v. Gardner, 387 U.S. 136, 155, 87 S. Ct. 1507, 18 L. Ed. 2d 681, 695 (1967), the Supreme Court noted that "the declaratory judgment and injunctive remedies are equitable in nature . . ." As the Second Circuit stated in Holup v. Gates, 544 F.2d 82, 85, fn. 3 (1976): "The granting of declaratory relief is governed by equitable principles, . . . and within the sound discretion of the reviewing court."

[8]Congress, in the final days of the Second Session of the 95th Congress, reenacted the identical language in its FY 1979 HEW appropriations bill. *See* Preterm, Inc. v. Dukakis, supra, slip op. at 11, fn. 5.

[9]It should be noted that the "Hyde Amendment" at issue in Doe v. Mathews was Section 209 of Pub. L. No. 94-439, 90 Stat. 1418, the predecessor to the current Hyde Amendment. The former Hyde Amendment differs from the current one in that the former permitted the use of federal funds to perform abortions *only* "where the life of the mother would be endangered if the fetus were carried to term."

[10]42 U.S.C. §1396d(b) provides, in part:

"The term 'Federal medical assistance percentage' for any State shall be 100 per centum less the State percentage; and the State percentage shall be that percentage which bears the same ratio to 45 per centum as the square of the per capita income of such State bears to the square of the per capita income of the continental United States . . . except that (1) the Federal medical assistance percentage shall in no case be less than 50 per centum or more than 83 per centum, . . ."

[11]The parties have stipulated that prior to the enactment of the various Hyde Amendments, "the federal government's contribution to the State of Missouri for medicaid reimbursement for abortions was in some instances on a federal to state ratio of 90:10 percent when the same were considered as part of the family planning program and in some instances on a federal to state ratio of approximately 60:40 percent when the same were considered as part of the regular medical assistance program.

"It is the belief of all parties that the federal government no longer considers any abortions, even those qualifying under the 'Hyde Amendment' provisions, to be reimbursable under the family planning program ratio and that all abortions, if any, are reimburseable only under the regular medical assistance program in its present ratio for Missouri of 60:66:39.34 percent."

APPENDIX 4

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF MISSOURI

CENTRAL DIVISION

REPRODUCTIVE HEALTH SERVICES, a Missouri Corporation, et al., *Plaintiffs,* vs. JAMES F. WALSH, et al., *Defendants.*	**No. 77-4171-CV-C**

MEMORANDUM AND ORDER

Plaintiffs brought this action on July 29, 1977, challenging the validity of a Missouri regulation which prohibited public funding of abortions except in those cases where the attending physician, in the exercise of his best clinical, medical judgment "believes a full-term pregnancy and childbirth would cause cessation of the mother's life." In stating their claims in the Complaint, plaintiffs make reference to, *inter alia,* the Fourteenth Amendment to the United States Constitution and 42 U.S.C. §1983. Jurisdiction is founded upon 28 U.S.C. §1331 and §1343.

In this Court's opinion, plaintiffs have properly raised and argued two very substantial claims with regard to the

validity of the challenged Missouri regulation: (1) that the Missouri regulation contravened the dictates of the Medicaid Act and the regulations promulgated thereunder (see Part I of "Plaintiffs' Response and Suggestions to Court Order of February 17, 1978," received by this Court on March 1, 1978), and (2) that the Missouri regulation transgressed the equal protection clause of the Fourteenth Amendment.

Plaintiffs prevailed on their first substantial claim, although the relief granted by the Court was not as extensive as plaintiffs desired. As made clear in this Court's Opinion and Order on the merits of this case, the reason plaintiffs were not granted all the relief they sought with regard to their Medicaid Act claim is that this Court disagreed with plaintiffs' view of the Hyde Amendment's impact. At p. 11 of their March 1, 1978 Response and Suggestions, plaintiffs argued:

> "Thus, the impact of the Hyde Amendments has been merely to withdraw federal funding contributions from the costs of those abortions still required to be performed under state Medicaid programs (i.e., medically necessary abortions). The costs of such abortions must be met 100% by the state itself, as a condition of state participation in and federal funding by Medicaid generally."

This Court, however, in its January 26, 1979 Opinion and Order, rejected plaintiffs' argument, stating, for the reasons set forth therein (and which will not be restated here): "After a careful review of the applicable law, this Court is of the opinion that the Hyde Amendment . . . does *not* cause there to be imposed upon participating states the burden of providing 100% of the funding for all medically necessary abortions for which federal reimbursement is precluded by the Amendment." Consequently, plaintiffs

did not wholly prevail on their Title XIX (Medicaid Act) claim. As this Court stated on January 26, 1979:

> "Thus, while plaintiffs prevail on the merits of this cause, the relief afforded will be limited in nature; that is, while the Missouri statutory and regulatory laws limiting public funding of abortions are violative of Title XIX, this Court views the applicable federal law as requiring that Missouri fund abortions for the needy only insofar as it will receive reimbursement therefor pursuant to the substantive sharing formula set forth in the Medicaid statute. To the extent that the Hyde Amendment withdraws federal funding of Medicaid abortions, Missouri is thereby relieved of its burden to contribute its share to fund such abortions."

Having thus partially invalidated the challenged Missouri regulation on the basis of plaintiffs' Title XIX claim, it was not necessary to rule on plaintiffs' claims that *that* regulation, as promulgated by the State of Missouri, violated the Fourteenth Amendment; rather, what was done by the Court was to test the Constitutionality of the regulation *as it was modified by this Court to bring it into compliance with the dictates of the federal Medicaid Act.* Thus, defendants' argument, set forth at pp. 4-5 of their February 20, 1979 Suggestions in Opposition, that this Court should deny plaintiffs' Motion for Attorney Fees because this Court "den[ied] relief with respect to all constitutional arguments advanced by the plaintiffs in this case" must fail. As has just been noted, because plaintiffs partially prevailed on their Title XIX claim, it became unnecessary to rule on the Constitutionality of the Missouri regulation in its original form. Whether that regulation, without the benefit of the modification imposed by this Court pursuant to Title XIX, would have sustained an Equal Protection attack, is an issue which was not addressed by the Court.

Plaintiffs, because of their Title XIX argument, forced the modification that *may have been* the *sine qua non* of the denial of plaintiffs' equal protection argument.* Consequently, the Court cannot accept defendants' argument that plaintiffs should be denied attorney fees under 42 U.S.C. §1988 because of their failure to prevail on the ultimate equal protection issue, that issue being: does the Missouri regulation, *as made consistent with the Hyde Amendment*, transgress the Equal Protection clause?

Clearly, plaintiffs are entitled to recover attorney fees pursuant to 42 U.S.C. §1988 by virtue of their prevailing on their argument that the Missouri regulation is contrary to Title XIX of the Social Security Act. The reason that state laws which conflict with federal laws must be stricken is, of course, the Supremacy Clause, U.S. CONST. ART. VI, cl. 2. 42 U.S.C. §1983 creates the cause of action which serves to vindicate such rights.* Federal jurisdiction over this claim is invoked either independently under 28 U.S.C. §1343 or pendent to plaintiffs' equal protection claim.** Plaintiffs raised their §1983 claim in their

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*The Court expresses no opinion on whether the Missouri regulation, *as written by the State*, would have survived an equal protection attack.

*As the Court stated in Lund v. Affleck, 442 F. Supp. 1109, 1113 (D.R.I. 1977): "[T]here is substantial authority that suggests that §1983 actions lie to redress federal statutory as well as constitutional claims. [citing cases]"

**There can be no doubt in this case that plaintiffs' equal protection claim passes the substantiality test imposed by Hagans v. Lavine, 415 U.S. 528, 94 S. Ct. 1372, 39 L. Ed. 2d 577 (1974). In *Hagans*, the Court was faced with a suit by certain AFDC recipients challenging a provision of the New York Code of Rules and Regulations permitting the State to recoup prior unscheduled payments for rent from subsequent grants under the AFDC program. The plaintiffs alleged that the recoupment regulation violated the Equal Protection Clause and contravened the pertinent provisions of the Social Security Act governing AFDC and the regulations promulgated thereunder by HEW. The action sought injunctive and declaratory relief pursuant to 42 U.S.C. §1983 and 28 U.S.C. §2201 and jurisdiction was invoked under 28 U.S.C. §1343(3) and (4). Speaking to the jurisdictional question, the Supreme Court, at 537, 39 L. Ed. 2d at 587, stated:

"Section 1343(3) therefore conferred jurisdiction upon the District Court to entertain the constitutional claim if it was of sufficient substance to support federal jurisdiction. If it was, it is also clear that the District Court could hear *as a matter of pendent jurisdiction* the claim

(Continued on next page)

Complaint and fully developed it, in subsequent briefing, in terms of a conflict between Title XIX (and HEW) regulations) and the Missouri regulation. As such, plaintiffs' argument that the state regulation conflicted with the federal Medicaid Act was properly brought pursuant to their claim for relief under §1983. Accordingly, a fee award pursuant to 42 U.S.C. §1988 is appropriate. *See* Lund v. Affleck, *supra,* at 1112-1114.

> 42 U.S.C. §1988 provides, in part:
> "In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

Further, the Senate Report on the bill ultimately enacted as the Civil Rights Attorney's Fees Award Act of 1976 stated:

> "It is intended that the standards for awarding fees be generally the same as under the fee provisions of the 1964 Civil Rights Act. A party seeking to enforce the rights protected by the statutes covered by [the Civil Rights Attorney's Fees Award Act of 1976], if successful, 'should ordinary recover an attorney's fee unless special circumstances would render such an award un-

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Footnote continued

of conflict between federal and state law, without determining that the latter claim in its own right was encompassed within §1343." [emphasis added]

Clearly, therefore, given the substantiality of plaintiffs' equal protection claim, this Court's pendent jurisdiction over plaintiffs' claim of conflict between federal and state law has been properly invoked.

just.' Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 (1968)."

S. Rep. No. 94-1011, 94th Cong., 2d Sess. 4 (1976), *reprinted in* [1976] U.S. Code Cong. & Admin. News, pp. 5908, 5912.

In his affidavit in support of his motion for an award of attorney fees, plaintiffs' counsel, Mr. Frank Susman, states:

(1) He has been practicing law since 1966.

(2) During the year and one-half that this litigation has been pending, he has expended 64.5 hours in the prosecution of this cause.

(3) The customary and reasonable hourly rates for matters of this type during the time period involved is $75.00 per hour.

(4) The customary and reasonable value of affiant's services is $4,837.50.

(5) Attorney Shurin, who has served plaintiffs as local counsel, has been paid $250.00 for his services in that capacity.

(6) The total amount due plaintiffs as their reasonable attorney fees is $5,087.50.

The Court has considered Mr. Susman's affidavit, plaintiffs' motion and suggestions, and defendants' suggestions in opposition thereto. Neither side has requested a hearing on the matter.

The Court has further given careful consideration to the factors set forth in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974). With regard to those factors, the Court finds that the 64.5 hours expended by Mr. Susman in the prosecution of this cause is a fair and reasonable reflection of the time and labor required by this case; the questions presented by this case are novel

and are difficult of resolution; accordingly, the skill required to perform the legal services necessary to properly represent plaintiffs is high; plaintiffs interests have, in this Court's view, been well-represented by Mr. Susman throughout this litigation; while no monetary relief has been sought, the impact of a case such as this on the lives of many individuals is very high; while plaintiffs did not receive from this Court all the relief which they sought, this lawsuit did result in an order requiring the State of Missouri to significantly alter its policy with regard to the public funding of abortions. This Court would set the reasonable hourly rate in litigation of this type at $65.00 per hour, however, not the $75.00 per hour set forth in Mr. Susman's affidavit.

Having considered all the factors set forth in *Johnson, supra,* and having been fully advised of the positions of the parties, it is the opinion of this Court that plaintiffs should be, and they are hereby, awarded attorney fees in the sum of Four Thousand Four Hundred Forty-Two and 50/100 Dollars ($4,442.50) pursuant to the provisions of 42 U.S.C. §1988.

IT IS SO ORDERED.

Elmo B. Hunter
JUDGE